ART. VII.—*An Abstract of Muhammedan Law, by* Lieut.-Colonel VANS KENNEDY, M.R.A.S., &c. &c. &c.

Preface.

THE Muhammedan law is divisible into two parts perfectly distinct—the religious and the municipal. On the first numerous works have been written, and it must therefore seem singular that the latter has never, as far as I am aware, attracted attention; for the real nature of the state of society, and of the government in Muhammedan countries, can never be clearly understood, unless both the religious and the municipal law are taken into consideration. To supply, therefore, this defect, is the intention of the following pages; and sensible as I am of the very imperfect manner in which it has been executed, I can only trust, that any information on a subject not before discussed will prove acceptable to the Society.

It may be necessary to observe, that the municipal law of the Muhammedans is founded professedly on the Koran, and the traditions which have been preserved of the sayings and actions of the prophet and his four immediate successors. To ascertain and decide on the authority of any particular tradition, is esteemed by the Muhammedans a science the most excellent and recondite; and from the admission or rejection of particular traditions have originated the four orthodox sects into which the Sunnis are divided, and the difference of opinion which sometimes exists among the jurists of the same sect. With respect to these sects, it is sufficient to observe that the opinions of MÁLIK and HANBAL are scarcely ever quoted by the writers of the Hanifah sect, and that their followers are at present few in number. The decisions of SHÁFI'Í are treated with more attention, though, as Mr. HAMILTON remarks, "they are seldom quoted by the doctors of Persia or India, but with a view to be rejected or refuted." His followers are confined principally to Egypt and Arabia; but his doctrine is also followed by the descendants of the Arabs, the Mapillas of Malabar, which renders a reference to his peculiar opinions frequently necessary at Bombay: I have not, however, been able to procure any of his works.

But the prevailing sect, which embraces almost the whole of the Muhammedan world, is that of ABÚ HANÍFAH, who was born at *Kúfah* in A.H. 80 (A.D. 702), and died at *Baghdad* in A.H. 150 (A.D. 767). As Mr. HAMILTON, in his preliminary discourse to the *Hidáyah*, has related the life of ABÚ HANÍFAH as fully as any re-

maining accounts would admit, I shall merely extract the following passage:—"He is described of a middling stature, a comely countenance, and pleasant conversation, harmonious in his voice, of an open and ingenuous disposition, and kind to excess to his relations and friends, admitting none to his society but of the best character. Such a disposition and conduct necessarily secured to him the universal esteem, while his polemical abilities gained him the reverence and admiration of his disciples, as may be collected from an anecdote which is recorded by SHÁFI'Í in the introduction to his *Usúl*, where he relates, that inquiring of MÁLIK whether he had ever seen HANÍFAH, he was answered by that doctor, 'Yes; and he is such a person, that if he were to assert a wooden pillar was made of gold, he would prove it to you by argument!' SHÁFI'Í himself, although differing from him materially in his legal decisions, says in another part of the same work, 'that no study whatever would enable any man to rival HANÍFAH in the knowledge of the law.' It appears, indeed, from the best authorities, that he was a man eminently endowed with science, both speculative and practical; of a mild disposition and tolerating principles; pious, abstinent, charitable, and accomplished beyond all others in legal knowledge. His diffidence is said to have increased with the extent of his acquirements; and he has, indeed, afforded an instance of insurmountable and scrupulous modesty, such as has been seldom recorded, but which twice exposed him to the most severe treatment from his superiors, and probably, in the end, shortened his life. It is related, that HUBAIRA, the governor of *Kúfah*, importuned him to accept the office of *Kází*, or judge, and upon his persisting in refusing it, caused him to be scourged for ten days successively with ten stripes a day, until at length being convinced of his inflexibility, he released him; and some years after, the KHALIF AL MANSÚR having invited him to Baghdad, tried to prevail on him to accept the same office, which declining as before, he was thrown into prison, and there confined until he died."[1]

ABÚ HANÍFAH, however, is principally indebted for his celebrity to his two disciples, ABÚ YÚSUF and MUHAMMED. The first is said

[1] This passage is evidently taken from IBN KHALIKÁN's *Biography of Illustrious Men*; as it agrees very nearly with similar passages in the account given of ABÚ HANÍFAH by that author. But Mr. HAMILTON has most unfortunately used the words *diffidence* and *modesty*; for the motives by which ABÚ HANÍFAH was actuated, and for which he has obtained the greatest celebrity, were the fear of God, and the apprehension that he might, if he accepted the office of *kází*, be betrayed into committing injustice, and by thus distressing and injuring the people of God, endanger the safety of his own soul.

by some writers to have been the chief *Kází* under the *Khalífs* Mahdí, Hádí, and Hárún-ur-Rashíd; and by others, that he was appointed to that situation by the last of these *Khalífs*. But it is universally admitted that he was the person who first regulated the department of *Kázís*, and obtained permission for their being distinguished by a particular dress. He also first established the principles of jurisprudence, and rendered it a distinct science and pursuit. His abilities and learning obtained him the highest honour and celebrity, and enabled him to give an extensive currency to the opinions of his master. He was born at Kúfah in A.H. 113 (A.D. 731), and died at Baghdad, A.H. 182 (A.D. 798). The other, Muhammed, was born at Wásit in A.H. 135 (A.D. 752), and died at Rai in A.H. 189 (A.D. 804). He studied jurisprudence first under Abú Hanífah, and afterwards under Abú Yúsuf. Scarcely any particulars seem to be known of his life; but he has distinguished himself, and conferred a most important benefit on his sect, by his numerous writings, in which he has preserved the opinions and decisions of his two masters. He is the earliest author of a complete digest of the municipal law of the Muhammedans; and it seems that his arrangement of the subject has been adopted by all subsequent writers. It need only be added, in the words of Sir W. Jones:—"That although Abú Hanífah be the acknowledged head of the prevailing sect, and has given his name to it, yet so great veneration is shewn to Abú Yúsuf, and the lawyer Muhammed, that when they *both* dissent from their master, the Musalmán judge is at liberty to adopt either of the two decisions, which may seem to him the more consonant to reason, and founded on better authority."[1]

The work, on which the following abstract depends, is named *Hidáyah*, the author of which, Burhán ud Dín Alí, was born about A.H. 530 (A.D. 1135), and died A.H. 591 (A.D. 1194). It is admitted by all the followers of Abú Hanífah to be a work of the greatest authority, and it bears internal evidence that it fully deserves this character; as the opinions and arguments contained in it are supported by constant quotation of the most approved principles and decisions. When, therefore, Mr. Hastings was desirous of procuring some standard work, which might serve as a rule and guide in the administration of justice according to the Muhammedan laws, the *Hidáyah* was brought to his notice; and he directed it to be translated from the original Arabic into the Persian language. Of this translation Mr. Hamilton gives the following character:—"When the English

[1] Sir William Jones's Works, vol. iii. p. 510.

translator came to examine his text (translated literally from the Persian), and compare it with the original Arabic, he found, that except a number of elucidatory interpolations, and much unavoidable amplification of style, it in general exhibited a faithful copy, deviating from the sense in but a very few instances, in some of which the difference may perhaps be justly attributed to the inaccuracy of transcribers; and in one particular it is avowed and justified by the Moulavís, because of an alleged error of the author. Many of the interpolations are indeed superfluous; and they sometimes exceed, both in length and frequency, what could be wished. They, however, possess the advantage of completely explaining the text, from which every reader may, for the most part, with ease discriminate them." But I am afraid that the Persian version is indebted for this favourable character to the partiality of a translator, and that it might with more justice be described in the following words, applied by Sir W. Jones to a similar version of the *Sirájiyyah*, also made by order of Mr. Hastings:—"The translation must appear excellent, and would be really useful to such as had not access to the Arabic original; but the text and comment are blended without any discrimination, and both are so intermixed with the notes of the translator himself, that it is often impossible to separate what is fixed law from what is merely his own opinion. He has also erred (though it be certainly a pardonable error) on the side of clearness, and made his work tediously perspicuous."[1]

I am not certain whether or not this version was ever printed, but a revised edition of it was published at Calcutta in 1807, which is the one that I have used. The editor, Maulaví Muhammed Rashíd, observes, that in 1776, in pursuance of an order from Mr. Hastings, the chief *Kází*, with the assistance of three other learned men, undertook the version of the *Hidáyah* from Arabic into Persian; but as they did not live to revise it, numerous errors and important mistakes existed in the translation, and that he had been in consequence directed to revise it carefully. The task intrusted to him he thinks he has fully executed; and that the edition published contains a translation which is in every respect accurate, and a commentary free from erroneous or illegal arguments and opinions. These remarks, it will be evident, call in question the correctness of Mr. Hamilton's opinion just quoted; but, as far as I have compared the revised Persian version with Mr. Hamilton's translation, I have observed no difference deserving of the slightest notice; and I

[1] Sir William Jones's Works, vol. iii. p. 508.

must therefore conclude that the MAULAVÍ attributes to himself a merit to which he is not entitled.

It is much to be regretted that Mr. HAMILTON, instead of translating the Persian version, had not translated the original Arabic. He, indeed, observes, and justly, "that a literal translation from the Arabic would have left the sense, in many places, as completely unintelligible to the English reader as the original itself." But, without materially departing from the text, this difficulty might have been easily obviated; and the present translation is made so literally from the Persian, retaining even in some places the technical terms of the original without explanation, that it must be nearly unintelligible to the English reader without notes or a running commentary. Mr. HAMILTON, however, has not added either; and I am, therefore, inclined to think that his most laborious work[1] cannot be understood by the English reader, without a repeated perusal and the most patient study. The same reason must also prevent its being of much use to those who are but moderately acquainted with Persian or Arabic. The original, at the same time, being translated so extremely literally, has unavoidably occasioned the real meaning to be often obscured, and sometimes rendered in a manner entirely different from what was intended by the author.

Of the following abstract, the object has been to explain concisely the most important principles of the municipal law of the Muhammedans; and I have, therefore, been obliged to depart altogether from the arrangement of the original, and to express myself generally in my own words. My guide in executing a task, for which I do not possess the necessary qualifications, has been the celebrated commentaries of BLACKSTONE. But it is probable that I may have passed over particulars which required to be noticed; and still more probable, that, in condensing the contents of four quarto volumes into these few sheets, and necessarily avoiding as much as possible all examples and arguments, I may not have rendered the principles which are noticed sufficiently clear and intelligible. The difficulty of selection has been greatly increased by the singular want of arrangement which runs through the whole of the *Hidáyah*, in which, as a reference to the appendix will shew, it is impossible to discover the slightest trace of plan or method. The different books are equally involved in confusion; so much so, that I found an important passage

[1] The Persian version and commentary consist of four volumes, and are, at least, three times larger than the original work; and though the first volume has not been translated, Mr. HAMILTON'S English translation fills four quarto volumes.

respecting the responsibility of a king under the head of *fornication and adultery*. But I may still hope, that notwithstanding its imperfection, the novelty and importance of the subject will confer an interest on this abstract to which it would not otherwise be entitled.

ABSTRACT OF MUHAMMEDAN LAW.

It is not, I believe, generally known that the Muhammedans possess a code of laws which is, in theory, distinguished by the principles of justice and freedom. But their effect, in practice, has been rendered in a great measure nugatory by MUHAMMED having sanctified that equality which prevailed amongst the Arabs at the time that he assumed the character of a prophet; religion has consequently prevented the establishment amongst the Muhammedans of any distinction of ranks which would otherwise have probably taken place when they increased in power and riches; and thus the whole authority of the state having devolved on the sovereign, unchecked by any council, corporate body, privileged class, or assembly of the people, Muhammedan princes have found little difficulty in rendering themselves despotic. But this despotism is in direct contradiction to the precepts of the *Korán*, and to the example of MUHAMMED and his four immediate successors; which alone are the rules that ought to regulate the conduct of every true believer. On these, also, are the Muhammedan laws founded, and hence are they held in such veneration that frequent instances occur in history of even powerful princes having been obliged to submit to their control.

Despotic, therefore, as a Muhammedan prince may appear to be, it will be found, on closer examination, that his power is considerably limited by the peculiar opinions of the people. They firmly believe that their government rests on a revelation from Heaven; and as they are in general acquainted with this revelation, and have been from their childhood instructed in the principal customs and laws derived from it, any material deviation from established usage on the part of the prince immediately excites the people to resistance. Hence, also, that class of men whose business it is to explain this revelation, and to preserve its precepts in their original purity, have acquired such influence as enables them often to oppose successfully the measures of the prince.

From this class are the *Kázís*, or judges, selected; and it might therefore be expected that the impartial administration of justice would greatly alleviate the evils of despotism; nor can it be doubted but that in all Muhammedan kingdoms, while they continued in prosperity, this effect was in general produced: the prince might

oppress or punish, without form or process, the persons immediately connected with his court; but his caprices or his cruelties would scarcely ever affect the great mass of the people. There were no feudal lords to trample on the people as their vassals and to defy justice; and though the governors of provinces might be rapacious, still regard to their own interests would prevent them from carrying their exactions to too great an extent. Security of person and property was the privilege of every true believer held under the sanction of religion, and the fear of rousing the prejudices of the people would consequently set bounds to oppression. The divine origin, also, of the Muhammedan laws, and the influence of the body by whom they were dispensed, would, on all common occasions, prevent any material infringement of these laws, or any undue interference with the regular distribution of justice. The laws might not be sufficient to afford protection against the arbitrary acts of the prince, but they were perfectly adequate for the repression and punishment of the injuries and crimes of the people.

There was, however, a material defect in the administration of justice, for it was intrusted in different places to a single individual, who, alone and unassisted, decided both on the fact and the law, and, in many cases, on the punishment. The only check on his proceedings was the obligation to investigate every cause in public. Thus justice depended on individual character; and it may therefore be supposed, that the *Kázís* who dispensed it were not unfrequently ignorant, partial, and corrupt; but, in general, the publicity of their proceedings would compel them to be circumspect in their conduct; and the *esprit de corps*, and the desire of respect and distinction, would prevent them from giving an ignorant or unjust decision. While, therefore, a Muhammedan government retained its vigour, the just administration of a simple and equitable code of laws rendered the people indifferent to the arbitrary power of the prince; and, if the *Kázís* were sometimes partial, this defect was fully compensated by the very expeditious and unexpensive manner in which all suits and trials were decided.

An inquiry, therefore, into those laws from which the state of society in Muhammedan countries has received its peculiar modification cannot be devoid of interest; but I much fear that this interest will be greatly diminished by the dryness of a mere abstract. As, however, nothing material has been omitted, this compendium will perhaps be more effectual than a larger work in conveying a general notion of the principles of Muhammedan law. In the discussion of this subject I have not confined myself to the arrangement of the

author, whom I have taken as my guide, but adopted that of the distinguished commentator on the laws of England as the one to which the reader must be the best accustomed.

Amongst the Muhammedans no disquisitions respecting the origin or nature of law have ever taken place, nor has any distinction in their own laws ever existed; they believe that these are derived from the express command of God revealed either in the KORÁN, or in the actions and conversations of their prophet which have been preserved by tradition. The greatest simplicity, therefore, prevails in their laws; and no perplexity arises from the disagreement of customs, codes, or courts of justice. In some cases there is a difference of opinion amongst the principal jurists, but on every material point their decisions are the same.

Blackstone divides his Commentaries on the Laws of England into four parts: 1. The Rights of Persons; 2. The Rights of Things; 3. Private Wrongs or Civil Injuries; 4. Public Wrongs, or Crimes and Misdemeanours.

PART I.

RIGHTS OF PERSONS.—PARLIAMENT.

In Asia kings have been always despotic, and there does not appear in history any trace of their power having ever been controlled by a general assembly of the people: but a small part only of Arabia was subject to monarchy, and the greatest part maintained a state of independency, which was little restrained by the heads of tribes in whom the chief authority was nominally vested. On all affairs which concerned the tribe, it was requisite that the whole tribe should be consulted. In this manner were the Arabs living when MUHAMMED rose to power, and neither he nor his four immediate successors made any innovation in this custom of their country; all the true believers who were present in the camp, or at the place of the *Khalíf's* residence, continued to be consulted on all affairs of importance; but, when MOÁVIAH usurped the khiláfat and removed his capital to Damascus, he laid aside the humility of his predecessors, and assumed, with the power, the forms and arbitrary authority of an eastern prince; since which time the Muhammedan people have never been allowed to interfere in any manner in the government; and have been, in consequence, obliged to express their disapproval of their sovereign's measures by insurrection and rebellion.[1]

[1] The *Kuriltái* of the *Tátár* tribes fell into disuse after their conquest of Persia.

THE KING.

It will perhaps excite surprise to find the doctrine of an implied contract between king and people inculcated by a Muhammedan jurist; but it is clearly expressed in the following definition, which I translate literally: — "A lawful king is he who is perfect in all that is required by the faith of Islám; that is, a true believer, an observer of the precepts of religion, of sound understanding, arrived at years of discretion, and to whom the people have sworn allegiance, and with whose government they are satisfied." By which it is intended that he should be a propagator of Islámism and a protector of the true believers, affording them security in their persons, property, and women; that he should receive tenths and taxes in conformity to the law; that he should distribute from the treasury what is lawfully due to learned men, preachers, *Kázís*, *Muftís*, colleges, professors, teachers, and others, and that he should dispense justice to the people; and whosoever possesses not these requisites he is not a lawful king, and consequently obedience to him is not necessary; but, on the contrary, it is necessary to rise against him, and to carry on war against him until he returns to the right path, and does that which is right, or until he is slain.[1] It will be admitted that the above contains a very correct definition of the duties of a king, and that had the theory been reduced into practice, the Muhammedans would have enjoyed the most perfect liberty; but rights are of little avail without institutions to protect them, and with such institutions the inhabitants of Asia seem to have been at all times unacquainted. The theory, therefore, of a Muhammedan government, inculcated both by law and religion, is freedom and equality; but the practice has necessarily become despotism in consequence of there being no legal restraints to prevent the abuse of the unlimited powers which have been arrogated by the sovereign.[2] In the last case, as long as he has the means of supporting his authority, he is sole and supreme judge, pontiff, legislator, and king. In the former case he can make no innovations whatever in the established laws whether religious or civil, but he

[1] It is also held that a king is not liable to punishment for any offence which he may commit, because punishment belongs to God, and is merely intrusted to a king in order to deter men by example; but this advantage could not be derived from the king inflicting punishment on himself. He is, however, responsible whenever he infringes the rights of individuals; and is therefore subject to the fine for blood, and to compensation for injuries to private property.

[2] The prerogatives of a Moslem king scarcely admit of definition; for he must either regulate his conduct according to law, or he must exercise an arbitrary power which knows no other bounds than the resistance of the people.

alone is invested with the whole executive power, and with the right of making war and of coining. The latter is considered in Muhammedan countries as the peculiar distinction of sovereignty. The king is also generalissimo, and the fountain of justice, dignity, and office. The two last, however, do not seem to be acknowledged in Muhammedan law, or at least not admitted to possess any peculiar privileges, as they are not noticed in the *Hidáyah*.[1] Government, however, could not be carried on without ministers, generals, and governors of provinces and towns; but all dignity is dependent on office, which is bestowed by the prince alone; and there are no hereditary ranks of nobility and no hereditary offices known amongst the Muhammedans.

With regard to the succession to the throne the law is silent; were, however, the example of MUHAMMED to be followed, it ought to be elective, as he did not appoint a successor, and the four first *Khalífs* were elected by the people. But this omission of the prophet was the cause of the most fatal dissensions and schisms amongst the Muhammedans; MOÁVIAH seems, therefore, to have found little difficulty in abolishing the right of election and in establishing the khiláfat in his own family. Succeeding princes confirmed this innovation; and it is now recognised as law by the Muhammedans, that the right of succession to the throne belongs to the royal family, and that the king may appoint whichever of his sons he pleases to be his successor. This last rule has originated from the right of primogeniture being unknown to the Muhammedans; and to it must be ascribed the murders, parricides, and wars, which have so often taken place in Muhammedan dynasties.

REVENUE.

The Muhammedan jurists hold, that revenue is paid to the king merely in trust for defraying the expenses of protection and government, and for the subsistence of certain classes of the people. He ought, therefore, to take no more from his subjects than what is requi-

[1] The making war on infidels being a duty incumbent on all true believers, the *Hidáyah* discusses at great length the duties of the king as generalissimo; but I have not thought it necessary to make any abstract of this part of the work, nor of what relates to war, captured property, peace, &c. It ought, however, to be observed, that a Muhammedan prince is not at liberty to conclude a permanent peace with infidels, because such a peace would be an infringement of the positive command of God, which enjoins war to be carried on against infidels; but, in imitation of the prophet, who concluded a truce with the men of Mecca for ten years, the prince may also agree to a truce for this length of time, but no longer; and also, according to the example of the prophet on that occasion, should it be expedient for the true believers to commence the war previous to the expiration of the truce, the prince may do so, on giving intimation of his intentions to the enemy.

site for these purposes, though the law should allow him to receive a larger sum. Revenue is lawfully derived from three sources; tenths, a land-tax, and a capitation-tax: originally the Muhammedans drew a distinction between the revenue paid by themselves and by the inhabitants of the countries which they conquered. The first they called *ushr*, or a tenth, which alone was paid by the true believer; the other was called *khiráj*, and amounted to one half of the produce of land, which was levied on such people as were subjected either by capitulation or force of arms. Much legal learning is displayed in the *Hidáyah* respecting what lands are *ushr* and what are *khiráj*. But as the distinction between them seems to have ceased at a very early period of Islámism, it will not be necessary to take any further notice of it; it may, therefore, be considered that the revenue of Muhammedan princes arises either from a land or a capitation-tax.

At first Omar fixed the land-tax according to measurement, each *jaríb* of dry or wet cultivation, or of fruit-trees, being assessed at a certain sum: but this mode of collecting the revenue was soon discontinued, and in lieu of it the land-tax was fixed at one half of the gross produce, to be paid either in kind or in money. The author of the *Hidáyah* observes,—"This tax ought not to exceed what the land can afford to pay; be it, therefore, known, that our jurists have decided that the utmost which the land can afford to pay is one half of the produce, and more than this ought not to be taken; one half is just, and not oppressive, because it was lawful to capture both the persons and the lands of the conquered people and to divide them amongst the Moslems; and therefore taking one half only of the produce of their lands must be equally lawful: but, if the land cannot afford to pay one half, the prince must take less; for to take less is lawful, but to take more than the half is not lawful.

"If the crop fail either from excess or want of water, or from any other accident, such as locusts, drought, &c. the tax shall not be levied, because it was not in the power of the proprietor to bring the crop to maturity.

"But if a crop fail through the neglect of the proprietor, he shall pay the tax.

"If land produce two crops in the year, the tax shall be taken from the first crop only."

Such are the simple and equitable principles on which the land-tax ought to be levied; and however they may have been infringed on particular occasions, or by arbitrary princes, such are the principles by which all lawful assessments on land ought to be regulated: a tax of one half of the gross produce may appear to be excessive; but it is

to be recollected, that in Muhammedan countries the theory of the economists has been reduced into practice, and that their indirect taxes are unknown, all revenue being derived from the land.

The capitation-tax forms scarcely an exception, as it is trifling in amount, and levied only on such persons as are not Moslems. This tax seems to have been imposed not on account of its value, but as a mark of subjection and a distinction between the true believer and the infidel; and it must have been every day rendered more unproductive by the conquered people becoming converts to the religion of their conquerors. The legal amount of this tax ought not to exceed annually from the rich forty-eight dirhems (about sixty shillings), from the middling classes twenty-four dirhems, and from tradespeople and the lower classes, twelve dirhems; but the payment of it does not exempt the landholder from also paying the land-tax: women, children, slaves, and freedmen, are exempted from the capitation-tax.

OFFICERS OF GOVERNMENT.

I am not acquainted with any native work that explains the manner in which the administration of government in Muhammedan kingdoms was conducted. From history it can only be inferred, that the kingdom was divided into provinces, and that the governors of them exercised an unlimited power: they seem to have been vested with the authority of appointing to all provincial offices (with the exception perhaps of that of *Kází*), of raising and commanding such troops as they might think necessary, and of collecting the revenues and of retaining such part of them as was requisite for the expenses of the provincial administration; but in what manner these revenues were raised is, I believe, no where mentioned: it would, however, seem probable, that the collection was made immediately by the head men of villages and towns, which would of course render it unnecessary to employ many officers on the part of government in the general receipt: but of that elaborate system of government which was introduced into India by the emperors of the house of Tímúr, there does not appear to be the slightest trace discoverable in the accounts of any other Muhammedan kingdom.

THE PEOPLE.

According to the principles of their religion the Muhammedans in every country which they have conquered, though perhaps constituting but a small part of the population, have held that no person is entitled to the rights and privileges of a Moslem unless he embraces the faith of Islám. All the conquered people who adhere to the

religion of their fathers are deprived of the full benefit of the laws, and labour under various disqualifications; but a description of these disabilities had better be deferred: and I will now proceed to the consideration of the two kinds into which, according to Blackstone, the people are divisible.

The Muhammedan law recognises no division of the people into clergy and laity, nor is there any class expressly set apart for the worship of God: every Moslem individually makes his ablutions, repeats his prayers, and performs all other religious acts; and even in their general assemblies on Fridays, any Moslem may perform the duty of Imam; but, as both law and religion are derived from the Koran and traditions, it became indispensable that some persons should dedicate themselves to their study. There has consequently arisen a large body of theologians and jurists, who have gradually formed, from the respect and veneration in which they are held, a separate and distinct class of the people: they possess, however, no legal privileges, and receive no provision either from tithes or from the state; but the piety of individuals has founded schools, colleges, mausoleums, and mosques, and endowed them with ample revenues, which fully provide for the education and support of all who dedicate themselves to the study of jurisprudence and theology.

But, though equally respected, this class differs in most points from the clergy of other countries: they must, indeed, prepare themselves for their future profession by a long and peculiar course of study, and they must maintain a peculiar sanctity in their manners, and devote themselves with peculiar zeal to a due performance of every act which is enjoined by their religion: continual meditation on one particular subject must also occasion bigotry and intolerance. "Au reste (to use D'Ohsson's words) l'ordination et la consécration sont des rites inconnus aux Mahométans; ils s'en tiennent à la cérémonie de l'institution, et pour les docteurs, et pour les magistrats, et pour les ministres du culte — aucun de ces trois états n'exige ni sermens, ni vœux, soit de pauvreté, soit de chasteté; aussi presque tous sont engagés dans les liens du mariage: ils ont même la faculté de quitter leur carrière et d'entrer dans une autre si bon leur semble." These three divisions of this class may perhaps be better described as judges, and muftis, or doctors in law,[1] rectors and professors of colleges, and preachers and readers of the Koran; but, as D'Ohsson also observes,—"L'organisation de ce corps respectable, et les réglemens

[1] I am not aware of any European term which corresponds with the duty of this description of men, which consists in their giving decisions on all points of law or doctrine which may be referred to them.

particuliers de chacune des trois branches principales qui le composent, n'ôtent à aucun individu la liberté de passer de l'une à l'autre; chacun d'eux est reputé habile à remplir et *le ministre du culte*,[1] et celui de la justice, et celui des loix." By this class alone are various offices of the state held, and while so employed they receive a certain salary; in the same manner, such as are particularly attached to mausoleums and mosques, receive a suitable provision from the revenues with which they are endowed.

This class, however, being vested with no rights or privileges, are not personally the object of any particular laws; but various laws have been established for giving legal effect to pious gifts and bequests, and for regulating charitable and religious foundations. At the same time, a material difference of opinion has existed amongst Muhammedan jurists with respect to alienations to charitable uses; for ABÚ HANÍFAH held that such alienations could not be made in perpetuity, and that the alienor did not divest himself of his right in the property aliened; that, therefore, the alienor might revoke the alienation and dispose of such property either by gift or sale, and that at his death it devolved on his heirs. But ABÚ YÚSUF and MUHAMMED hold that such alienations may be made in perpetuity; and that therefore the alienor loses all right in the property aliened, and that such property cannot be affected either by gift, sale, or inheritance. This last opinion has been legalized in all Muhammedan countries; and in conformity to it have the laws on this subject been framed, the principal of which are the following: —

Three opinions are held with respect to what is required to make an alienation to charitable uses good in law; for ABÚ HANÍFAH holds that they are not valid unless the declaration[2] of the alienor is confirmed by a decree of the magistrate; ABÚ YÚSUF, that the declaration alone is sufficient; and MUHAMMED, that the declaration must be accompanied with delivery. But the correct opinion is that of ABÚ HANÍFAH.

A man may in his lifetime aliene the whole of his property, but he cannot bequeath more than one third of it.

Property aliened to charitable uses cannot be affected by gift, sale, or inheritance.

[1] This expression is inaccurate, and may convey an erroneous notion of the Muhammedan religion; it must, therefore, be remarked, that in it there are neither rites nor ceremonies, nor any pastoral or episcopal duties corresponding to those of other religions.

[2] Deeds do not seem to have been originally in use amongst the Muhammedans, and their place was therefore supplied by declaration before witnesses.

Such property cannot be divided, but the rents arising from it may be divided.

The alienor may annex conditions to the alienation, and may appoint an administrator of the property aliened, and these dispositions are protected by the law.

The rents arising from alienations to charitable uses shall be first employed in the cultivation of the land, the repairs of buildings, and such necessary expenses, and then appropriated to the purposes of the foundation.

Whenever waste or neglect takes place the magistrate shall interpose his authority, and either cause the administrators to observe the laws, or, in case of disobedience or inability, take the management of the foundation into his own hands.

The law likewise requires that the rents of these alienations shall be expended annually either in support of the foundation or in alms to the poor, and thus has prevented their increase by accumulation or purchase; but the gifts and the bequests of the pious have been equally effectual in withdrawing a great proportion of the property of every Muhammedan country from circulation by dedicating it to the service of religion.

I have before observed, that a distinction of ranks is unknown to the Muhammedan law, and that it is equally repugnant to every precept of the Muhammedan religion; but when the Moslem power became extended over a great part of Asia, Europe, and Africa, the administration of government could not be conducted without the agency of many superior and inferior officers. Various offices have, therefore, been created; and the possessors of them enjoying riches and power are necessarily elevated above the rest of the people. A numerous and distinct class of nobility has thus been formed; but the dignity is personal, and depends on office and on the precarious favour of the prince. The claims of birth, and the merits of a distinguished ancestry, have no existence in Muhammedan countries; and, therefore, the humblest peasant, or the meanest follower of the camp, finds his lowly birth no obstacle to his attaining the highest dignities. But though the men in power are thus evidently separated from the rest of the people, they cannot be considered as a class possessing any political privileges or influence. The first the law denies them; and the latter can never belong to the mere creatures of a prince, who are exalted or depressed by his caprice or favour, and who stand singly unsupported by family connexions and hereditary respect. A governor of a province has occasionally been enabled to raise a rebellion against the prince, and has even in former times succeeded

in establishing an independent state; but this power was exerted for the gratification of private ambition, and never have the nobles united together so as to render their employments hereditary, and thus form a privileged class which might control the acts of the sovereign. While, however, they retain their offices and the smiles of the prince, they enjoy that respect, submission, and distinction, which always attend riches and power.

Amongst the rest of the people no distinctions have arisen either from law or custom; but, as in other countries, the man who lives by his estate is more respected than the merchant, the merchant more than the artificer, and the artificer more than the labourer. It would, however, require a much more familiar knowledge with the private life and economy of the Muhammedans than I possess, to determine the exact degree of influence which they may derive from the possession of property; but it does not seem that it was ever such as to enable the private rich man to infringe the laws with impunity.

RELATIONS IN PRIVATE LIFE.

Blackstone observes, that the four great relations in private life are, 1. Master and servant; 2. Husband and wife; 3. Parent and child; and 4. Guardian and ward.

On the second of these relations the Muhammedan laws are very minute and very copious; but as these principally relate to the conduct of the husband and wife towards each other, it will be sufficient to notice such of the laws only as require more particularly the intervention of the *Kází*,[1] as disputes between man and wife are in general adjusted by their relations. The Muhammedan law, then, considers marriage as a contract, and treats it as it does all other contracts, allowing it to be good and valid in all cases where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contract; and lastly, actually did contract in the proper forms and solemnities required by law.

First, If the parties be of sound mind, and of the years of discretion, their consent makes the marriage valid; but if not, as is generally the case in Muhammedan countries, the parents, or legal guardians of the parties, must consent to the contract.

Secondly, The following causes disable persons from contracting, or being contracted, in marriage; 1. Certain degrees of consanguinity or affinity; for a man cannot marry his grandmother, mother, father's

[1] It must, however, be recollected that the magistrate may take cognisance of every act, whether it be *contra pacem regni*, or merely *contra bonos mores*.

wife, grandfather's wife, daughter, grand-daughter, sister, grand-aunt, aunt, niece, daughter-in-law, grand-daughter-in-law, step-daughter, step-grand-daughter, wife's sister, foster-mother, foster-sister, his own slave-girl, or the daughter of a slave, the daughter of an infidel, nor the mother and daughter of a woman with whom criminal conversation has been held, or who has been touched for that purpose; nor can a man marry two wives, who, if the one were a man, would be related to each other in the prohibited degrees. 2. A prior marriage, or having another husband or wife living; that is, a man cannot marry a married woman whose husband is living, nor can a woman marry a man who has already four wives. 3. Want of age. In Muhammedan law it does not seem supposed that minors will themselves contract marriages, and therefore the laws regard the parents or legal guardians; for if minors be married by their fathers or grandfathers, the marriage shall continue valid when the parties come of age: but if they be married by any other relation or guardian, each of the parties, on coming of age, may either confirm or dissolve the marriage; but in the last case, a decree of the magistrate is necessary in order to prevent disputes. Nor shall the marriage of minors be considered as confirmed on their coming of age unless they declare their consent to it, or shew that they have consented by such acts—as the delivery and receipt of the dower, consummation, kisses, and the like. 4. Want of consent of parents or guardians: and 5. Want of reason. A minor, or a lunatic, observes the author of the *Hidáyah*, has not the power of marrying, because he has no power over his own acts; and this power is, therefore, vested in the person who will be induced by affection to discharge it most faithfully. But if the parent or guardian be absent, and his return be distant or uncertain, this power will devolve on the next person entitled to the guardianship by law; and in case of a minor or lunatic having no parents or legal guardians, the power of marrying him will devolve on the prince and the magistrate.

Lastly, The parties must not only be willing and able to contract, but actually must contract themselves in due form of law, to make it a good marriage; but it must be observed, that amongst the Muhammedans the parties to the contract are not the bride and bridegroom, though their consent, if of age, is indispensable. "Jamais," says D'Ohsson, "la fille ni aucune femme n'assiste à la solemnité du mariage: il se fait par procureurs; et les parens des deux maisons signent le contrat avec l'imam de la mosquée, en présence de trois ou quatre amis, qui servent de temoins." Any contract made in

words of the perfect tense,[1] and in presence of two witnesses, who are free men, of years of discretion, of sound understanding, and of the Muhammedan religion, or of two Moslem women and one man, renders a marriage valid. The essential requisite of marriage is the presence of witnesses; for the prophet said, *it is not a marriage unless there be witnesses.* But the delivery or promise of a dower is not requisite, and a marriage may even be contracted when it is stipulated that no dower shall be given. Custom, however, has rendered the delivery or stipulation of a dower indispensable.

Amongst the Muhammedans, the liberty of dissolving marriages by divorce is left entirely to the inclination or caprice of the husband, provided that he is neither a minor nor a lunatic. Restricted to the husband, this remark of CHARDIN is perfectly correct:—"La religion Mahomitane tient le divorce licite, de quelque manière qu'il se fasse, et pour quelque sujet que ce soit. Il suffit qu'une des parties soit degoutée de l'autre, et qu'elles se veuillent démarier, fut-ce, d'ailleurs, les plus sages et les plus honnêtes gens du monde, ils font divorce." The book on this subject in the *Hidáyah* is singularly minute, and contains almost every expression denoting or implying separation which a husband can address to his wife, either in jest, in earnest, or in anger; and carefully points out which expression will render the divorce valid. It is even held that if a husband, while deprived of his senses by intoxication, divorce his wife, such divorce is good in law; but to prevent in some measure the effects which might result from this unlimited power, the wife is not allowed to contract another marriage for three months and ten days[2] after the divorce; and if, before the expiration of this term, the husband reclaims his wife, she is obliged to return to him whether willing or not. The husband may thus divorce and reclaim his wife twice; but if he divorce her a third time he cannot recover her until she has been married and divorced by another person. The right of divorce belongs properly to the husband; but the wife may obtain an absolute divorce, in the case of her husband being either impotent, leprous, or lunatic. The law also allows her to purchase an absolute divorce from her husband. The author of the *Hidáyah* observes:—"Whenever a difference arises between a husband and wife, and they become apprehensive lest they should not be able to discharge properly the duties of matrimony, there is nothing to prevent the wife from de-

[1] In the Arabic language there is neither a present nor a future tense.

[2] In the *Hidáyah*, it is ten days after being purified from the third catamenia.

livering herself from the power of her husband, by giving to him in her lieu a part of her property; for the prophet has said, *There is no sin in a wife delivering herself from the power of her husband, by giving property in lieu of herself; and there is no sin in the husband receiving such property.* If, however, the difference has been occasioned by the husband from a desire to marry another wife, he ough not to require any gift for the divorce; and in no case ought he to require more than the amount of the wife's dower.

The legal consequences resulting from marriage are not distinctly laid down in the Muhammedan law. It would seem, however, that in theory the husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts, and injuries; but in practice custom has placed the wife entirely under the power of the husband, and should she at any time enjoy any separate rights, it must be with his consent. And CHARDIN justly observes: "La justice ne connoit que rarement des différends qui arrivent entre le mari et la femme, des mauvais tours qu'ils se peuvent faire, et des sujets qu'ils ont de se separer. Le lieu où les femmes sont renfermées est sacré, surtout chez les gens de condition; c'est un crime pour qui que ce soit de s'enquerir seulement de ce qui s'y passe. Le mari y exerce une pleine puissance sans la participation de personne." The husband, however, is bound by law to furnish his wife with a place of residence, clothes, and food; both during the time that she lives with him as his wife, and during the prescribed period after a divorce: but if she elopes from him, he is not obliged to furnish her with necessaries.

The next relation in private life, noticed by BLACKSTONE, is immediately derived from the preceding, being that of parent and child. The Muhammedan law obliges the father to provide for the maintenance, protection, and education of his legitimate children, as long as they remain minors, that is, until they arrive at the age of puberty. The boys should remain with their mother, or other female relation, until they are able to walk, according to some jurists; and according to others, until they are seven years old: and though the daughters may be withdrawn at the same age, it is recommended that they should remain as long as they are minors under the care of their mother or other female relation; after which the sons and daughters are to be placed under the immediate protection of the father. But the law exempts the mother from contributing in any manner to the maintenance or education of her children, and even from nursing them. The author of the *Hidáyah*, however, observes, that though

the mother cannot be obliged by law to suckle her infant, yet piety demands that she should perform this duty.

The laws laid down in the *Hidáyah* respecting parent and child, apply entirely to the minority of the latter; but though minority ceases at about fourteen years, the children still continue in the father's house; and while residing under his protection, whatever their age may be, he is bound to provide for their maintenance, and exercises nearly the same power over them as when they were minors. But in what this power consists, the Muhammedan law nowhere specifies. In return for the care and maintenance afforded them by their parents, the children are bound to support their parents whenever they are unable to procure a subsistence, either from sickness, old age, or poverty. This law is equally binding on grandchildren and grand-parents, brothers and sisters, nephews and nieces, and uncles and aunts, in case of the death of the more immediate relations; and it is in general most faithfully adhered to in every Muhammedan country.

With respect to the relation of guardian and ward, the Muhammedan law considers two descriptions of persons as subject to guardianship—minors and lunatics. The guardian is always the nearest male relation, preference being given to the father, then the grandfather, the elder brother, &c., and, if there be no relations, the *Kází*. The guardian is intrusted with the care both of the person and the property of the ward, and is vested with the same power over him as a father over his child; his duties, therefore, and legal obligations, are the same. A guardian may sell or otherwise dispose of his ward's moveable property; but he cannot divorce his wife, manumit his slaves, nor alienc his landed property.

According to the Muhammedan law, a ward has not the power and liberty of acting except with the consent of his guardian, for the nature of actions depends on the knowledge and intention with which they are done; but minors and lunatics, from their want of understanding, are incapable of comprehending or forming an intention. If, however, the guardian consents to an act, his knowledge supplies the defect of judgment on the part of the ward: all sales, therefore, and contracts made by a ward without the consent of his guardian, and all acknowledgments of such sales or contracts are invalid. On the same principle, a divorce, or the manumission of a slave, pronounced by a ward, are invalid: his want of judgment, also, exempts him from punishment in all cases where the offence incurs the penalty of the *lex talionis*, or of certain punishments prescribed by the Koran. But

if a minor or lunatic commit any damage on the property of another, he shall be responsible for the injury done; for the Muhammedan law holds that the owner shall receive a compensation for all damages done to his property, whether intentionally or not.

It is singular that a point of so much importance, as the exact age at which a minor becomes capable of acting for himself, should have occasioned so many different opinions amongst the Muhammedan jurists as to leave it nearly undetermined. ABÚ HANÍFAH is of opinion that a boy and a girl are of age as soon as the usual signs of puberty have completely appeared; and if these signs do not appear, that a boy obtains his majority at eighteen and a girl at seventeen years of age. ABÚ YÓSUF and MUHAMMED, and also SHÁFI'Í, hold that a boy or girl, on completing the fifteenth year, is to be considered as adult. The difference of these opinions will, indeed, depend on the country; but Muhammedan jurists lay it down, that the earliest period of puberty with regard to a boy is twelve years, and with respect to a girl nine years; and it is evident that this opinion will hold good in almost every country in which Islamism prevails. It is also certain that the power of the father over the child, and of the guardian over the ward, does not cease at this early age; but I cannot discover any passage in the *Hidáyah* which authorises the distinction between being of age, and being of years of discretion. It never, however, could be intended that a boy of fourteen years of age was capable of performing the duties of *Kází*.

The relation of master and servant is not acknowledged by the Muhammedan law, which considers the employment of one free man by another to be merely a contract, and the reciprocal responsibility to depend entirely on the terms of the agreement. The law does not sanction or impose any peculiar duties or obligations either on the part of the employer or that of the person employed.

Amongst the Muhammedans domestic service has been always principally performed by slaves; and the discussions respecting them in the *Hidáyah* occupy, as Mr. HAMILTON has observed, nearly one-third of the whole work. But the reasons which he has assigned in explanation of this circumstance, do not seem to me to be at all satisfactory; for nothing appears in history which can authorise the supposition, that slaves at any time formed not only a great part of the wealth of individuals, but also a principal proportion of the community in any Muhammedan country.[1] On the contrary, they seem

[1] I must also dissent from his opinion, that "the cases and examples cited with respect to them are not exclusively restrictive to slaves, but may be considered in the light of so many legal paradigms, equally applicable, in their construction, to

never to have been employed except as servants, and never to have exceeded the number that were requisite for that purpose. There were no extensive manufactories, no mines in which they could be employed; and, as the Muhammedans scarcely ever engaged in agriculture, their lands were invariably leased to the inhabitants of the conquered country, by whom they were cultivated. Among them, consequently, the situation of a slave is entirely different from what it has ever been among any other people, except the Hindús. They are, indeed, separated from their native country, deprived of their liberty, and subjected to various civil disabilities; but their labour is easy, their masters are kind and indulgent, and their toils are lightened by the prospect of emancipation. It is, however, almost impossible to form any general notion of the subjection or protection of Muhammedan slaves, as far as it depends on the law, from the numerous passages scattered without the slightest arrangement throughout the *Hidáyah*. But the following circumstances would seem most deserving of notice.

The truest principles of humanity breathe in the following passage of the *Hidáyah*: "It is incumbent on the master to furnish his slave, male or female, with necessaries;[1] for the prophet has said, *slaves are your brethren whom God has placed under your subjection, therefore feed them with the same food which you yourselves eat, and clothe them with the same clothes which you yourselves wear, and oppress not the servants of your God.* If, therefore, a master do not furnish his slaves with necessaries, and they be capable of labour, they shall be allowed to labour, and their gains shall be appropriated to their maintenance; for in so doing a proper regard is paid both to the right of the slave and the right of the master, and the profit is reciprocal, since the property of the master and the life of the slave are thus equally preserved. But if the slave be incapable of labour from any valid cause, the master shall be compelled either to sell him or to furnish him with necessaries.

The master possesses complete dominion in his slave, and may

any other articles of commerce or exchange;" because the right of a master in a slave or freedman is most carefully distinguished by Muhammedan jurists from the right which an owner possesses in any other kind of property, and consequently every act relating to them must form a special case, to be decided by rules perfectly inapplicable to the use and conveyance of any other species of property.

[1] Under the term *necessaries*, the Muhammedan law understands a place of residence, food, and clothes, which should always be suitable to the fortune of the master. The Muhammedans, however, in general strictly follow the precept of the prophet, and treat their slaves in the same manner as they treat the rest of their family.

therefore chastise him, hire out his labour, or dispose of him by gift sale, or bequest; even if he should kill him he is not liable to any punishment in this world. But he is held responsible for the acts of the slave so far, that, in all cases of private or public wrongs, he must pay the compensation required by law, or deliver up the slave.

The slave cannot legally perform any act without the consent of his master; nor can he possess property, all his earnings being the right of his master. There is, however, a singular inconsistency in the Muhammedan law, for it admits slaves to contract debts, and directs the insolvent slave to be sold for the benefit of his creditors. A slave cannot marry without the consent of his master, but he may divorce his wife without his master's consent, and the *status* of the issue proceeding from a slave's marriage depends on that of the mother; for if she be a free woman, whether the husband be a freedman or slave, the child is free: and if the mother be a slave or freedwoman, though the husband be a free man, the child belongs to the *status* of his mother. The person of the slave is protected by the law against every one except his master; and whoever, therefore, steals him, or injures, or kills him, is obliged to make legal compensation to his master: but though the law in general considers a slave merely in relation to his master, yet in all cases of offences not redeemable by fine, the slave himself is personally responsible for his actions; and the master, as before observed, may always exonerate himself from the fine by delivering up the slave.

As, however, the legal restriction imposed on the acts of a slave arises solely from the right of property possessed in him by his master, and not from any natural defect in the slave, who is otherwise capable of acting, being endowed with speech and judgment, it necessarily follows that this restriction may be removed by the master. The law, therefore, authorises a master to permit his slave to set up a trade or to engage in merchandise; and it is not necessary that this permission should be publicly declared, for the circumstance of a slave acting for himself is a sufficient proof that he has obtained his master's consent. If any master grant a permission for a specific period, or for a specific kind of traffic, the permission shall be understood generally, and the slave be at liberty to carry on any traffic that he pleases, and until such time as the master duly withdraws the permission; in withdrawing which, it is necessary that the master give public notice to some of the merchants and traders of the place: and the permission also ceases on the death of the grantor.

The slave thus licensed acts on his own account, and not by delegation from his master; the master is, therefore, not responsible

for any act done by the licensed slave, and the latter acquires the right of property, during his lifetime, in all that he gains over and above the stipulated sum due to the master in lieu of his labour as a slave. The licensed slave may lawfully perform all acts that relate to trade, such as buying and selling, entering into partnership or agency, renting houses or lands, &c.; but he cannot make a gift nor a loan: he cannot also manumit any of his slaves, nor marry. Thus he enjoys a certain degree of liberty; but he is still considered as the property of his master, who may at any time either enfranchise him or sell him, provided that he first satisfies the creditors for any debts which the licensed slave may have contracted. The latter, therefore, cannot be either the heir or legatee of any person; and his own property does not descend to his children, nor can he bequeath any part of it by testament. If he die unencumbered by debt, the whole of his property devolves on his master; and if he be in debt, the debts must be first liquidated, and the residue, if any, then goes to the master.

The Muhammedan jurists have expended a most unnecessary deal of trouble on the subject of slavery; for, besides the class of slaves just mentioned, there are two other descriptions, concerning which the laws are equally copious and minute. The one is a slave to whom his master has promised manumission after his death—and such a slave cannot be disposed of by gift or sale, or be the subject of inheritance or testament, but must be immediately manumitted on his master's death; but during his master's lifetime, he is in every other respect in exactly the same situation as the other slaves. The remaining class is that of slaves who have redeemed their freedom by the payment of a stipulated sum to their master. This payment may either take place at the time of agreement, or be subsequently liquidated by instalments, which is the mode recommended by Muhammedan jurists. In the former case the slave immediately becomes a freedman; and the master thus loses his right of possession in the person of the slave, but he still retains his right of property. The freedman cannot therefore be sold by his master, his actions are not subject to his master's control, and his gains are during his lifetime entirely his own. But he cannot be an heir nor a legatee, nor does his property descend to his children, nor can he bequeath it by testament. It devolves on either his creditors or his master. If the payment be deferred, the slave is in the same situation as that of a licensed slave, except that he is allowed a greater exemption from his master's control.

By these different means the situation of slaves is divested of many

of its hardships, and it therefore seems singular that their absolute manumission should have been left entirely to the option of the master; but so sacred has property been held by the Muhammedans, that, even after a slave has paid his legal value to his master, he does not obtain his entire freedom, as exemplified in the class last mentioned. Religion, however, supplies this defect, for manumission is held to be the most meritorious of acts, and the most certain means of obtaining the divine favour. In cases of unintentional homicide, and of vows which have been infringed or not carried into effect, the expiation is held to be the manumission of a slave, if in the power of the person who committed the homicide or made the vow. On a death-bed, also, the manumission of slaves soothes the dying moments of their masters; and in the course of their lives many occasions occur in which, in the fervour of piety, they testify their gratitude to heaven for success or preservation by the enfranchisement of a slave. The legal effect of manumission is the admission of the slave, if a Moslem, to all the rights and privileges of a Muhammedan. His previous bondage leaves no disgrace nor disabilities behind it; and the new freeman becomes immediately competent to give evidence, and eligible for office, even for that of *Kází*.

TRIBUTARIES AND ALIENS.

The preceding observations apply merely to the Muhammedans, for they have always held themselves perfectly distinct from the people who formed, in the countries conquered by them, the great mass of the population. War against infidels is the peculiar duty of every Moslem, but MUHAMMED soon saw that this tenet must be modified, and he therefore enjoined that all people who submitted to the Moslems and agreed to pay tribute, should receive protection and be maintained in the undisturbed possession of their goods, lands, and religion. *Respect tributaries* (said the prophet), *for they are entitled to the same rights and subject to the same laws as the Moslems*; according to law, therefore, tributaries possess entire liberty in the use and conveyance of their property, whether by gift, sale, contract, or inheritance; but, in conformity to the Muhammedan law, they cannot bequeath by testament more than one third of it: and in case of injury either to their persons or property, they are entitled to the same redress which a Moslem would receive. Thus, in all cases of damage or injury done by each other, tributaries might depend on the protection of the law; but, in the case of a Moslem, it is easy to suppose that they, despised on account of their religion and labouring under several civil disabilities, would find it difficult to obtain

impartial justice. "It is incumbent on the prince (observes the author of the *Hidáyah*) to make a distinction between the Moslem and the tributary in the garments, the caps, the animals on which he rides, and the saddles of each; and the tributary is always to wear round his waist, on the outside of his garments, a cord made of wool and of the thickness of the finger, and not a silken belt. The tributary is not to be allowed to ride on a horse, nor to make any use of arms. These distinctions are requisite in order that proper respect may be at all times paid to the true believer, and to prevent such respect being paid by mistake to an infidel; for an infidel is not entitled to any respect, and therefore he is never to be saluted first, nor is a Moslem ever to quit the road for him. The women, also, of tributaries must be distinguished from the women of Moslems, and precedence be always given to the latter either on the road or in the bath. The houses of tributaries should even be marked in order to prevent Moslem beggars from demanding alms from them and from praying for them." The jurists have, also, laid it down that a tributary shall not be allowed to ride, unless it is absolutely necessary, and that when mounted he must always alight on meeting a true believer. Degrading as these distinctions are, the tributary is still further exposed to the contempt of every true believer by his being held incompetent to give evidence against a Moslem, and ineligible to any office or situation which can give him the slightest degree of power or authority over a true believer.

At the time when the first Muhammedan jurists composed their works, the Moslems had scarcely secured themselves in their extensive conquests, and the greatest part of the conquered people remained still unconverted to the faith of Islám. Many distinctions were in consequence introduced into the law respecting tributaries and aliens, who were divided into two classes, namely, the subjects of a state with whom the Muhammedans were at peace, and those of a state with whom they were engaged in war. But it is not necessary to advert to these distinctions, for it is held that an alien who lives one year in a Muhammedan country becomes *ipso facto* a tributary; and that during his residence in it, with the consent of the prince or magistrate, he is entitled to the same privileges and protection, and labours under the same disabilities, as a tributary; the law holds that all those descriptions of persons who disbelieve the true faith constitute but one and the same class; they are all equally incompetent to give evidence against a Moslem and ineligible to office, and must submit to all the degrading distinctions which have been already enumerated.

PART II.

THE RIGHTS OF THINGS.

Amongst the Muhammedans no disquisitions into the origin of property have ever taken place, and their jurists hold that every person possesses the right of property in all things real or personal which he has acquired by gift, sale, or inheritance. Sir WILLIAM JONES's remarks on this subject are as forcible as they are correct:—"Unless I am greatly deceived (he observes) the work (the Sirajiyyah) now presented to the public decides the question which has been started, Whether, by the Mogul constitution, the sovereign be not the sole proprietor of all the land in his empire, which he or his predecessors have not granted to a subject and his heirs? for nothing can be more certain than that land, rents, and goods, are, in the language of all Muhammedan lawyers, property alike alienable and inheritable; and so far is the sovereign from having any right of property in the goods or lands of his people, that even escheats are never appropriated to his use, but fall into a fund for the relief of the poor." After quoting several authorities, Sir WILLIAM continues:—"Now I am fully persuaded that no Musulman prince, in any age or country, would have harboured a thought of controverting these authorities — had the doctrine lately broached been suggested to the ferocious, but politic and religious Omar, he would in his best mood have asked his counsellor sternly, Whether he imagined himself wiser than God and his prophet? and, in one of his passionate sallies, would have spurned him from his presence had he been even his dearest friend or his ablest general; the placid and benevolent Ali would have given a harsh rebuke to such an adviser; and Aurungzib himself, the bloodiest of assassins and most avaricious of men, would not have adopted and proclaimed such an opinion, whatever his courtiers and slaves might have said in their zeal to aggrandize their master to a foreign physician and philosopher, who too hastily believed them, and ascribed to such a system all the desolation of which he had been a witness."

It will be evident that the opinion controverted by Sir W. JONES could never have arisen had a reference been made to the first principles of Muhammedan law; for it appears clearly from the Koran that the prophet, and consequently his successors, were not vested with any right of property in the goods or lands which the Muhammedans acquired by conquest — *and know* (says the Koran) *that whenever ye gain any spoils a fifth part thereof belongeth unto God and to the Apostle and his kindred, and orphans, and the poor, and*

the traveller. The remaining four-fifths were to be divided amongst the Muhammedans who had been engaged in the war; and each individual derived his right in the share which fell to him from the express command of God, and not from the will of the prince. This rule, however, at first applied merely to such spoils as were taken in battle, but as the Moslems extended their conquests it was considerably modified, at the same time that the principle was strictly preserved. The author of the *Hidáyah* lays it down, that if the prince conquer a country he is at liberty either to divide it amongst his soldiers in the manner prescribed by the prophet, or to leave it in the possession of the inhabitants on their agreeing to pay the capitation and land-taxes: in the latter case, the right of property also remains with the inhabitants. Whether, therefore, the lands of conquered countries continued in possession of the inhabitants, or were divided amongst the Muhammedans, the proprietors held them not as a grant of the prince, but as a free gift, which was liable neither to services of any kind nor to revocation.

This principle is fully exemplified in the laws relating to the cultivation of waste lands. According to Muhammedan jurists, such lands as are situated at such a distance from a village as the sound of the voice of a man calling out from it cannot be heard in them, and which yield no produce, and which have no owner, or the owner of them is unknown, are termed "dead," and the bringing them into cultivation is emphatically designated "the reviving of the dead;" but uncultivated land appertaining to cultivated land, such as pastures, roadways, &c. is not to be considered as waste. All Muhammedan jurists agree, that the person who first appropriates and cultivates waste land becomes *ipso facto* the lord of the soil. A difference of opinion, however, exists respecting whether or not such appropriation depends on the permission of the prince. Abú Hanífah maintains the affirmative, but Muhammed and Abú Yósuf support the negative. It is at the same time universally held that the prince is at liberty to bestow such lands in gift; but the right of the prince to dispose of waste lands, or to permit their cultivation, in no manner affects the complete dominion in them with which the cultivator becomes vested.

From this view of the subject, it will appear that the distinction between real and personal property, and the various tenures introduced by the feudal system, can have no existence amongst the Muhammedans. They acknowledge no superior, and the law imposes no restraint on them, during their lives, in the alienation of their goods or lands; their jurists, therefore, justly designate what we call

property by an emphatical word implying *dominion*. This dominion can be acquired only in four ways—1st, By conquest; 2d, By gift; 3d, By sale; and 4th, By inheritance.

1st. Of the first enough has been already said, and I shall therefore proceed to consider the laws relating to the other three.

2d. A gift is the act of transferring gratuitously the right and possession of goods or lands by the lawful proprietor of them to another person; and the formalities requisite to render a gift valid, according to Muhammedan law, are the offer, the acceptance, and the delivery: the last is the essential requisite, for if the gift does not take effect by immediate delivery of possession, it is then properly not a gift but a contract: the donor cannot retract the gift, but, should he wish to resume it, he may lay his case before the *Kází*, who is at liberty to cause it to be returned, should it appear to be illegal or prejudicial to the donor. The legal impediments to a gift arise from the definition of the term, for delivery being indispensable, a gift can consist of such things only as the donor can place in the immediate possession of the donee. Goods or lands, therefore, in expectation and not in possession, and a share in divisible property, cannot be conveyed in gift, for if the property be divisible the share must be previously realised; but if it be impartible, the gift is valid on account of its not being an object which admits of delivery: in the same manner, the flour to be produced from grain, the oil from seed, the fleece on the back of the sheep, the fruit on trees, and such things, cannot be disposed of as gifts.[1] But it is left entirely to the equity of the *Kází* to determine when a gift is so prejudicial to the donor as to authorize its being retracted.

3d. Sale is the exchanging of property for property, and it may consist either in a commutation of goods for goods, or in the transfer of goods for money. The Muhammedan law considers a sale as an agreement between the vendor and the vendee, and the conditions are left entirely to their option; but as soon as they have testified their mutual consent by the delivery and receipt of the goods, the property in them is transferred to the vendee, and that of the price to the vendor. Either of the parties, however, may demand, within an hour after the bargain has been struck, that it shall be cancelled; and if the goods are of value the parties may consent to a short delay, not exceeding three days, in order to determine whether they will adhere to the bargain or not. The goods sold must be the lawful property of

[1] To these impediments must of course be added lunacy, minority, and fraud or compulsion.

the vendor and in his actual possession; for the sale of goods in expectation, or the property of another without his consent, is not valid.

4th. Inheritance is the succession of the children or relations of a person deceased to the property, real or personal, of which he dies possessed; and as soon as it is divided amongst them in the manner prescribed by law they acquire complete dominion in the share which is allotted to them. The division of an estate amongst the legal heirs is the most intricate title of Muhammedan law, and I shall therefore refer to the tracts on this subject which have been published by Sir William Jones. It may, however, be observed, that the right of primogeniture is unknown amongst the Muhammedans, and that the inheritance is consequently divided in certain proportions amongst all the children or other heirs; that a wife, if there be no issue, receives a fourth, and if there be issue, an eighth; and that a male receives as much as the share of two females.

But every free man of sound mind and arrived at years of discretion is at liberty to bequeath, by testament, one-third of his property without the consent of his heirs; and in the case of his having bequeathed a larger proportion, the consent of the heirs is requisite in order to give validity to the bequest. Should they not consent, the third is to be divided amongst the different legatees in proportion to their respective bequests: thus, if the deceased bequeath to one person one-third, and to another one-sixth of his property, the legal third is to be divided into three shares, two of which shall be given to the former and one to the latter. If, however, the testator have no legal heirs, he may bequeath the whole of his property by his last will and testament: a legatee must not be one of the legal heirs of the testator, for in this case he would receive a larger share than that to which he is entitled by law; nor a person guilty of homicide, nor a debtor of the deceased, unless he previously pay the debt due by him; nor a slave. The legatee may either accept or refuse the bequest; and, if he accept it, he immediately acquires in it the sole right of property.

As a testament cannot have effect until the death of the testator, he is allowed to appoint an executor for the purpose of executing his last will; an executor must be a free Muhammedan, of sound mind, and arrived at the years of discretion. He may either accept or refuse the executorship; but if he has once accepted it in the presence of the testator, he cannot either in his absence, or after his death, refuse to discharge the trust. Should he, however, find himself incapable of performing the duty, he may apply to the *Kází* to be relieved from it, who will comply with his request if the reasons assigned be of

sufficient weight. The *Kází* may, also, deprive an executor of his executorship for malversation, or on a complaint of the heirs duly substantiated by evidence. The Muhammedan law considers an executor as the representative of the testator, and vests him with the same powers which the latter possessed in his lifetime: on the death, therefore, of the testator, the executor has the power of selling his property, and even his slaves, for the purpose of defraying his funeral expenses and legal debts: he also becomes intrusted with the property of the heirs, if minors; and if majors, he superintends its division according to law and the testament of the deceased. If the executor divide the inheritance in the presence of the heirs, but in the absence of the legatees, and delivery of their shares be given to the heirs, the division is valid; but, if the division take place in presence of the legatees, and in the absence of the heirs, such division is not valid; and, in case of an inheritance being divided either by the executor or the *Kází* in the absence of a legatee, and the legatee dies, the bequest shall descend to his heirs. The executor is vested with complete power over the moveable property of minors and of majors when left in his hands after division of the inheritance, which he may exchange, sell, or improve in any manner that he thinks proper. This, however, is granted him for the preservation of such property as is liable to decay, and the price is more easily preserved than the article itself; but as immovable property is imperishable, it cannot be aliened by the executor. In the event of an executor's death he may appoint another person to succeed him in the executorship. The check to prevent an executor abusing his trust is the authority of the magistrate, and more particularly the vigilance and interest of the relations and heirs of the testator.

The testator is at liberty to appoint more than one executor; but in the case of joint executors a difference of opinion exists amongst Muhammedan jurists respecting whether any one of them can legally perform any act of executorship without the consent of the others. The most correct opinion, however, would seem to be that the consent of all is necessary, except in as far as regards the funeral of the deceased and the immediate furnishing of his family with necessaries, which acts may be performed by any one of the joint executors.

If a man dies intestate, his property may either be divided by the heirs amongst themselves, or the *Kází* may appoint an executor.

By the four preceding modes is acquired a sole and independent right in property; but there is also an imperfect right in property, termed by BLACKSTONE property in *action*, which arises from contract, and which he has treated of in this part of his work. It will, however,

be better to defer a consideration of this subject until the next Part, in order that the Muhammedan law of contract, and the redress which it affords for breach of contract, may be explained at the same time.

PART III.

PRIVATE WRONGS.

In treating of this part I must deviate considerably from BLACKSTONE's arrangement; for, as I have before observed, there are not amongst the Muhammedans either forms of process or courts of justice which bear any resemblance to those of England: the *Kází* is the sole magistrate and judge; and in almost every case, whether of private or public wrongs, the action originates in the *rivá voce* complaint of the injured person, and the cause is conducted by the parties themselves without the intervention of advocates. I shall, therefore, previous to proceeding to enumerate the different private wrongs known to the Muhammedan law, explain,—1st, The legal duties and qualifications of a *Kází*; 2d, The form of process and trial; and 3d, The rules relating to evidence.

OF THE KÁZÍ.

The duties and qualifications of the *Kází* are laid down so distinctly in the *Hidáyah*, and are so consonant with the soundest principles of justice, that I shall merely abridge the passage.

The office of *Kází* can be executed only by a person who is free, of sound understanding, arrived at years of discretion, and competent to give evidence.

The prince ought to select for the office of *Kází* a person who is distinguished by his learning, by his knowledge of the law and the traditions, by his rectitude and piety, and who is fully capable of performing all the duties of the office.

There is nothing to prevent a true believer from accepting the situation of *Kází* if he believes that he is qualified for it; but, if he has any suspicion that he is not qualified, it is sinful in him to accept it, for oppression and injustice must be the consequence.

It is not proper that a true believer should either wish or ask for the office of *Kází*.

A true believer may accept the office of *Kází* under a usurper or tyrant, provided that he is permitted to discharge the duty according to law; but if he be ordered to act contrary to law, it is not allowable for him to accept it.

A *Kází*, on entering into office, shall depute two agents to the

former *Kází* to receive and make inquiries respecting all writings which may be in his possession, and respecting the state and progress of all causes determined or not determined; but this inquiry being intended solely for the ends of justice, must not be converted to the injury of the former *Kází*.

A *Kází*, on entering into office, shall make an inquiry into the causes for which the prisoners have been confined: if the prisoners confess their offences, this is sufficient; but if they deny them, and the former *Kází* have no witnesses to prove the fact for which they were committed, the new *Kází* shall not be in a hurry to liberate them, as it is to be presumed that the former *Kází* would not have confined them without cause; the new *Kází* must, therefore, cause proclamation to be made that such a person the son of such a person is in prison, and that any one who has been injured by him shall come forward and support his complaint: if, after a sufficient delay, no prosecutor appear, the prisoner is to be released.

A *Kází*, on entering into office, shall require an account of deposits from the former *Kází*, and cause him to deliver all that may be in his own hands, or in the hands of his agents, or of trustees appointed by him.

A *Kází* shall discharge his duties in a public place, free of access to every one, in order that there may be no suspicions of his rectitude; but he is at liberty to use his own house for this purpose, provided that he give free access to every one.

Some persons should always be present with a *Kází* when engaged in the duties of his office, in order to remove all doubts respecting the propriety of his conduct.

A *Kází* shall not receive any gifts except from his nearest relations, or in return for gifts which he may have bestowed previous to his appointment; but if the person who offers a gift be a party in a cause in process before the *Kází*, he must not receive it.

A *Kází* shall not accept an invitation to any entertainments made purposely for him, but he may accept other invitations; nor shall he appear at an entertainment given by one of the parties in a cause before him unless the other party be also present.

When the parties in a cause are before him, a *Kází* shall conduct himself in every respect with the strictest impartiality to each; he must not speak privately to either of them, or make signs to him, or prompt or instruct him in the conducting of his cause, because such conduct renders his justice suspected, and at the same time discourages the other, who will at once give up his right when he suspects that the *Kází* favours his adversary; he must not even smile or laugh

towards one of them, because this will encourage him and discourage the other.

It is highly improper for a *Kází* to lead or prompt a witness.

A *Kází* ought not to decide on a cause when he is hungry, or thirsty, or angry, or after a full meal, for these circumstances disturb the judgment and impede reflection; and a young *Kází* ought to satisfy his passion with his own wife previous to commencing his duties, in order that his attention may not be distracted by the women who may be in attendance.

A *Kází* shall not try any cause in the absence of the party accused; and if he have appeared in the first instance, and afterwards absented himself before the determination of the cause, the *Kází* shall not proceed to pass sentence; but in either of these cases if the representative of the party accused be present the cause shall be tried and decided. The Muhammedan law considers three descriptions of persons to be the representative of an absent defendant:—1st, An agent duly appointed by the defendant himself; 2d, A person so considered by law, as an executor is the representative of the testator; and 3d, A person so constituted by a decree of the *Kází*; for if the thing claimed by the prosecutor be in the possession of a third person who is present, the last shall be obliged to become defendant in the cause.

A decision passed by a *Kází* in favour of his father, or his mother, or his child, or his wife, is null and void; but a decision against these relations in favour of another person is valid.

A *Kází* shall hold valid and give effect to the decree of another *Kází* in all causes except when it is contrary to the Koran, to the traditions, or to established decisions.

A *Kází* cannot appoint a deputy without the consent of the sovereign; but he may employ another person either in his presence, or in his absence, in the trial and decision of causes.

OF PROCESS AND TRIAL.

The author of the *Hidáyah* does not explain the rules by which the preliminary steps to the trial of a cause ought to be regulated; but, it may be observed, that in all civil and most criminal cases the person injured makes his complaint *vivâ voce* to the *Kází*, and that it is the duty of the *Kází* to enforce the appearance of the person accused. In a few criminal cases offenders are apprehended without complaint being made either by an order of the *Kází*, or by the inferior officers of justice. It does not, however, appear whether the *Kází* has the power of imprisoning the defendant in civil cases previous to trial, or of admitting him to bail; and the same remark applies

to misdemeanours: but the very expeditious manner in which all trials are decided would seem to render either of these expedients unnecessary. In all cases of crimes the offender is imprisoned as soon as he is apprehended, and cannot be admitted to bail.

If the *Kází* be of opinion that there are sufficient grounds for the complaint, he summons the defendant; and as soon as both the parties are in attendance he proceeds to the trial of the cause; the plaintiff must then state the specific nature of the wrong which he alleges that he has sustained, for without such specification it would be impossible for the defendant to disprove the plaint, for the witnesses to depose respecting it, and for the *Kází*, in case of its being duly substantiated, to award the requisite restitution or compensation: the *Kází* then inquires of the defendant whether he acknowledges or denies the plaint? The Muhammedan law attaches the utmost importance to the acknowledgment or confession of the defendant, which is in all cases, even in capital cases, conclusive, and renders all further proceedings unnecessary; but the confession must be entirely voluntary, and must not be extorted by violence or torture. If, however, the defendant denies the accusation, the plaintiff must support it by evidence; but should he not be able to adduce any evidence, he may require that an oath [1] shall be administered to the defendant.

A difference of opinion exists among the Muhammedan jurists respecting the circumstances under which a plaintiff may require the oath of the defendant; ABÚ YÚSUF and MUHAMMED hold that such oath is the right of the plaintiff, and that it must consequently be granted to him on his mere demand; but ABÚ HANÍFAH maintains that the right of the plaintiff is founded solely on his inability to adduce evidence, and that, unless such inability be established, the plaintiff is not entitled to demand the oath of the defendant. As this right of the plaintiff depends on a saying of the prophet *that it belongs to the plaintiff to demand an oath from the defendant*, it follows that an oath can never be required from a plaintiff,[2] nor from

[1] In the *Hidáyah*, it is laid down that an oath taken in any other manner than in the name of God is invalid. The *Kází* may either direct the person taking the oath to swear simply by God, or he may require him to add in corroboration of it some of the attributes of God; but no particular time or place is necessary in order to give validity to an oath. Unbelievers are to swear simply by God, in whose existence all people believe; but a Jew is to swear by saying, I swear by the God that revealed the Pentateuch to Moses; and a Christian by saying, I swear by the God that sent down the Gospel to Jesus.

[2] There is, however, an exception to this rule in all disputes that relate to buying and selling, for in these cases the oath must be tendered both to the vendor and vendee. This is, however, conformable to the most received definition of a

a defendant in cases where there is no plaintiff. A defendant may reject the oath in two ways, either by expressly saying, "I will not take an oath," or virtually by remaining silent when called upon to take it, provided that he is neither deaf nor dumb; in either of which cases the *Kází* shall immediately award a sentence in favour of the plaintiff.

If further proceeding be not barred by the confession of the defendant, or his rejection of the oath tendered to him, the plaintiff is required to support his case by evidence.

The Muhammedan law, at the same time, recognises as legal two modes of adjusting the claims and disputes which may arise between individuals without the intervention of the *Kází*, viz. *accord* and *arbitration: accord* is an agreement between individuals in consequence of which simple claims are released either for or without a valuable consideration, or property is exchanged for property, or a stipulated compensation is given for some damage or injury. The prophet declared that *accord* was the best method of settling disputes between Moslems, and the law therefore considers all compositions duly executed as valid, and a bar to all future claims.

Arbitration is where the parties injuring and injured choose two arbitrators and submit the matter in dispute to their decision. An arbitrator must not be a slave, an unbeliever, a minor, or infamous, or convicted of *kazf*. All matters may be submitted to arbitration except such as relate to the *lex talionis*, and to certain punishments prescribed by the Koran. The arbitrators are empowered to found their award on the confession of the defendant, or his rejection of an oath tendered to him, or on the evidence adduced by the plaintiff, because these are methods of ascertaining the truth which are permitted by the law. Either of the parties may recede from the arbitration previous to the award being given, but after it has been given it is binding on each of them, and is a bar to all future claims: if, however, either of the parties be not satisfied with the award, he may bring the case before the *Kází*, who shall examine into the grounds on which it was passed, and if he find it conformable to law he shall confirm it, but if it be illegal he shall rescind it.

OF EVIDENCE.

The following are the principal definitions of evidence, and rules relating to it, which are contained in the *Hidáyah*.[1]

defendant, "one who denies," as in such cases the vendor and vendee equally deny the claim made by each other, and consequently each is both plaintiff and defendant.

[1] I here merely abridge the different passages in order that the doctrine of the Muhammedan law on this important point may be the more clearly shewn. Mr.

It is incumbent on all persons, when required by a plaintiff, to give evidence, and not to conceal his knowledge of the matter in issue; but testimony being the right of a plaintiff, the giving it depends on his request; and therefore in cases where there is no plaintiff, it is left to the option of every person whether they will give evidence or not: it is at the same time held, that it is most laudable not to give evidence in such cases, but to conceal the faults of a brother Moslem, and to abstain from injuring his character, for the prophet has said,—*That it is most advisable for every person not to give evidence* (except when required by a plaintiff), *and that God will draw a veil over the sins of him who conceals the faults of his brother Moslem.*

Testimony is of two kinds; 1st, Testimony relating to such things as of themselves convey a certainty of knowledge; for instance, confession, sale, homicide, and the like; for whoever hears a confession, or sees the delivery of an article sold, or the murder of a man, knows that such things have actually taken place, and may therefore give evidence respecting them; 2dly, Testimony relating to such things as of themselves do not convey a certainty of knowledge; for instance, facts given in evidence, because these may be either true or false, and therefore the person who merely hears such evidence cannot testify that these facts actually took place.

Testimony, therefore, cannot be given respecting any circumstance of which the witness does not possess a personal knowledge except in the case of birth, marriage, death, and the patent of *Kází*; for though testimony depends on personal knowledge, yet in these cases the law admits of a deviation from the general principle on account of the privacy which generally attends such circumstances, and which do not therefore admit of their being attested in the usual manner. It is, however, requisite that such testimony should rest on common report, or on information received from two respectable men, or one man and two women.

As, however, accidents might often prevent the attendance of witnesses, and men be thus deprived of their rights, the law admits as valid the testimony of an absent witness, if proved by two other witnesses, in all cases in which the legal presumptions are not in favour of the party accused;[1] but as this testimony is merely admitted

HAMILTON'S translation of this book, which, it must be admitted, is often very obscure in the original, does not appear to me to convey in many places the real meaning of the author, or to render it fully intelligible to the English reader.

[1] By this phrase is understood homicide and mayhem, and certain offences specifically mentioned in the Koran, which the law presumes that no Moslem would

from necessity, it must be established that the witness is either dead, or at the distance of three days' journey, or so sick as to be unable to appear before the *Kází*.

[From this principle, that evidence is the testimony of a witness who possesses a personal knowledge of the points in issue, it necessarily follows that neither presumptive nor written evidence is admitted by the Muhammedan law; for were a decision to be passed in consequence of the first, it is evident that it would not rest on the testimony of witnesses to the very fact in issue, but on the inferences and conclusions of the *Kází*. The presumptions arising from the several circumstances given in evidence may be of the strongest kind, but the Muhammedan law requires that the fact itself, if not confessed by the prisoner, shall be proved by two witnesses. It might, however, be supposed that as a bond or deed is the best evidence of the contract to which it relates, such a writing would be considered as evidence by the Muhammedan law; but the contrary would seem to be the case, as it is not mentioned in the *Hidáyah* as being a legal proof of contract.[1] The *Hidáyah*, at the same time, clearly shews, that all other writings, except the decrees of a *Kází*, and his official letters in a few particular cases, are inadmissible as evidence.]

In all cases except adultery and criminal conversation, the number of witnesses required by law in proof of a plaint are two men, or one man and two women; but the evidence of women is admitted only when that of men cannot be procured, as it supplies but imperfectly the want of the latter; for it is held that evidence depends upon observation, memory, and a capability of communicating correctly what has been observed; and though women are in a certain degree capable of observing, remembering, and communicating, yet the credit due to the result is greatly invalidated by their inattention and forgetfulness. This defect is in some measure remedied by the testimony of two women, as the memory of the one may assist that of the other; but the evidence of women is always liable to doubt, and it is not therefore admitted in any case in which the legal presumptions are in favour of the party accused.

The evidence, however, of a single woman is sufficient to prove

commit, and therefore to substantiate them direct and positive proof is required in order to remove all doubts; but in misdemeanours and injuries against property, the law supposes that the frailty of man and self-interest might occasion even a Moslem to deviate from rectitude.

[1] The received opinion seems to be that a witness cannot give evidence to a writing, though signed by himself or in his hand-writing, unless he actually recollect the transaction to which it relates.

the birth of a child, and in cases where it may be necessary to inspect a woman; but the evidence of more than one is preferable.

A difference of opinion exists among the jurists respecting whether or not a *Kází* is bound to make an inquiry into the character of the witnesses previous to receiving their evidence? Abú Hanífah maintains the negative; but Abú Yúsuf and Muhammed hold that the *Kází* is bound to make such an inquiry in all cases, and that it may be either made publicly or privately.

But all the jurists agree that if the defendant except to a witness the *Kází* must institute an inquiry into his character.

The following persons are incompetent to be witnesses.

Minors, unbelievers[1] (against Moslems), and slaves.

A father or grandfather in favour of his son or grandson; a son or grandson in favour of his mother or grandmother; and a husband in favour of his wife, or *vice versâ*; but testimony in favour of a brother or uncle is admissible.

A master in favour of his slave.

A partner in favour of his partner in a matter relative to their joint property; but the testimony of partners in favour of each other in matters not relating to their joint property is admissible.

A person punished for the crime of *Kazf*.

Mourners for the dead, singers, gamesters, drunkards, and usurers.

Persons who have committed crimes, or who are guilty of degrading or immodest actions,[2] because whoever commits a prohibited act, or is not restrained by a sense of shame, gives rise to a suspicion that he will not refrain from falsehood.

If a defendant plead any of the preceding exceptions to the competency of a witness, and establish them by proof, they shall be held valid, and exclude the testimony of the witness; but if a defendant accuse a witness of a transgression, not within the jurisdiction of the *Kází*, and offer to substantiate it by evidence, the *Kází* shall not listen to him, nor allow him to disclose circumstances to the prejudice of another's character, which do not relate to the cause under investigation.[3]

[1] But they may give evidence in favour of each other: Shafi'í, however, insists, that an unbeliever is unworthy of credit, and that he cannot therefore be a witness in any case.

[2] The examples given of these actions are making water or eating on the high road, and going naked into a bath.

[3] This is a perplexing passage, because, as it appears from the preceding rule, and will appear more clearly hereafter, there is no act whatever which is not subject to the inspection and animadversion of the *Kází*. I conceive, therefore, that the

If a defendant offer evidence to prove that the plaintiff has hired his witnesses, such evidence shall not be admitted, because the transaction does not affect either his person or property, and therefore he cannot found a plaint on it; but if the plaintiff held property of the defendant, and paid the hire of the witnesses from that property, the defendant would then have a case against the plaintiff, and by substantiating it incapacitate the plaintiff's witnesses.

If the holder of the property (*i. e.* the defendant) and the plaintiff both adduce evidence which proves the right of each to the property in issue, the evidence of the holder of the property shall be rejected.[1]

[Except in the case just mentioned, all the rules in the *Hidáyah* relate to the evidence adduced by the plaintiff; and it would seem therefore, and from its being held that testimony is the right of the plaintiff, that a defendant is not permitted in general to adduce any exculpatory evidence].

If the testimony of the witnesses does not apply to the specific matter in issue, and go to prove the plaint precisely as stated by the plaintiff, it shall be rejected.

The testimony of the witnesses must agree, both in meaning and words (as far as the latter relate to the wrong specified in the plaint), according to ABÚ HANÍFAH. If, therefore, one witness in a case of debt depose that the amount of the debt due is one thousand derhems, and the other witness depose that it is two thousand, no credit is to be given to either. ABÚ YÚSUF and MUHAMMED, however, hold, that in such a case the testimony is sufficient to prove the sum in which both the witnesses agree.

If witnesses, agreeing to the fact and the time, disagree with respect to the place, the testimony of all the witnesses must be rejected.

If a witness, before leaving court, and before the *Kází* has passed

true intention of this rule is, that a defendant shall not be allowed to accuse a witness of any other offence than such an one as renders him incompetent.

[1] The jurists of the Hanífah sect found this rule on a singular argument deduced from the definition of evidence; for they argue that possession is of itself a proof of the right, and that in such a case the right cannot be the subject of evidence, because evidence can only take place in cases where proof is required. But the right of the plaintiff is uncertain, and therefore susceptible of proof, consequently his evidence shall be admitted, and that of the defendant rejected. SHÁFI'Í, however, argues more correctly, and maintains that as the evidence on both sides is equal, that of the defendant must be admitted, because the possession is a corroborative proof of his right to the property. This opinion, it may be observed, is most consonant with the principles of the Muhammedan law, which consider delivery of possession as an essential requisite in all transfers of property.

sentence, state that he has, from agitation or alarm, committed a mistake in his evidence, he shall be permitted to rectify it, and such mistake shall not affect his credibility; but he shall not be permitted to correct his evidence after having left the court, because there is then reason to suspect a collusion between him and the plaintiff.

A witness may retract his testimony publicly in presence of the *Kází*, at any time before the *Kází* has passed sentence; and in this case the witness is not liable to make compensation to the party against whom it was given: for on such retraction the *Kází* must refrain from passing sentence, and therefore the party sustains no injury. If, on the contrary, the *Kází* have passed a decree, and the witnesses afterwards retract their testimony, the decree is not thereby rendered void; and the witnesses are, in consequence, obliged to atone for the injury done by their false testimony.

Abú Hanífah has said that a false witness must be publicly exposed throughout the town with a notification of his offence, but that he is not to suffer any other punishment; but Abú Yúsuf and Muhammed hold, that he is to be whipped and imprisoned at the discretion of the *Kází*; and Sháfi'í is of the same opinion.

PRIVATE WRONGS.

I have before observed that the Muhammedan law makes no distinction between real and personal property, the use and conveyance of each being governed by the same rules; but it draws a marked distinction between injuries to the person and injuries to property: for the first are held to be public wrongs, and are therefore restrained by the personal punishment of the offender. I shall, therefore, defer a consideration of these offences to the next part, and confine myself at present to such injuries to private property, not amounting to crimes, as are taken notice of by the Muhammedan law; and which may be divided into the non-performance of contracts, the unjust partition of joint property, and dispossession.

CONTRACT.[1]

Contracts may be divided, for the sake of perspicuity, into three

[1] In using the word contract, it may be necessary to observe that the Muhammedan law considers a contract according to the definition of the civil, and not of the English law; and that consequently this observation of Blackstone does not apply to it, a "*nudum pactum*, or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law." For, according to the Muhammedan law, a contract may be either with or without a valuable consideration.

kinds; such as relate, I. To persons; II. To goods and money; and III. To houses and lands.

I. Hiring is a contract from which the parties to the agreement derive a reciprocal advantage;[1] and to render it valid, it is requisite that the particular thing to be done, and the consideration to be received, should be distinctly specified. A consideration of some sort is indispensable; and it may consist of any thing which it is lawful to buy and sell. The persons hired are divided into two classes; those that are hired by the public at large, and those that are hired by individuals.

With regard to the first, such as bakers, tailors, washermen, &c. if an article delivered to any one of them perish while in his possession, ABÚ HANÍFAH is of opinion that he is not responsible for it; but ABÚ YÚSUF and MUHAMMED hold that he is responsible, unless it was destroyed by an accident which it was not in his power to prevent: for if the article bailed be lost or destroyed from any cause, such as theft or dispossession, which might have been avoided by ordinary care, it proves the negligence of the bailee, and he shall therefore be answerable; but if it be lost from an unavoidable cause, such as fire or violence, he cannot be accused of negligence, and is therefore exempt from responsibility. It is also held that the person hired is responsible for the loss, damage, or destruction of goods, which may have been delivered to him for the purpose of being worked up, or conveyed from one place to another; for instance, if a tailor destroy the cloth which has been intrusted to him, or a porter or beast of burden let their loads fall and destroy the goods contained in them, or a boat sink from the mismanagement of the boatman. The person hired is not entitled to his hire until he has finished the work or service contracted for, unless a specific agreement be made to that effect; and in all disputes between the bailer and bailee, with respect to the terms of the bailment, the affirmation of the bailer is to be credited if he confirm it by his oath: for in this case he is virtually the defendant, as he denies the claim of the bailee. If the bailer take the oath, the dispute is then to be decided in his favour.

Persons hired by individuals are such as contract, for a valuable consideration, with a particular person, to serve him, and no one else for a specific period, and in such kind of service as is agreed upon. As this contract does not depend on the exact performance of a parti-

[1] Mr. HAMILTON has improperly introduced the term usufruct into this definition; for though it applies to several of the transactions included by the Muhammedan law under the title of hiring, it will not apply to all; for it cannot be said that a workman has an usufruct in his work.

cular thing, the person hired is entitled to the stipulated consideration for the period contracted, whatever may be the manner[1] in which he serves the hirer. If also an article be lost while in his hands, whether by an act of others, or by an act of his own, he is not responsible for it; because, in the first case, it was placed in his hands by the owner himself, and therefore must be considered the same as a deposit: and in the latter case, the hirer's intrusting him with it is tantamount to his giving him a power over it; and, consequently, the servant becomes the deputy of his master, and as such his acts are held to be the acts of the hirer.

II. Contracts relating to goods and money are of seven kinds:—1. Deposit; 2. Pledge; 3. Sale; 4. Partnership; 5. Loan; 6. Commission; and 7. Caution.

1. A deposit is considered the same as a trust; and if, therefore, it be lost, damaged, or destroyed, the depositary is not responsible provided that he takes the same care of it as he does of his own property, and that the loss does not proceed from an unlawful act on his part, or from fraud. He may, therefore, intrust the care of it to his family or servants without responsibility; but if he place it with a third person, or in a warehouse or other place of security belonging to a third person, he becomes responsible for it. In the same manner, if the depositary be obliged to take a journey, and be accompanied in it by his family, he incurs no responsibility if the deposit be lost; but if the journey be not necessary, and he be not accompanied by his family, he becomes responsible, because he ought to have left the deposit with his family. If, also, he does not adhere to the terms prescribed by the depositor on giving him charge of the deposit, if any be prescribed, he is answerable for it. In case the deposit becomes mixed with property of the depositary, so as to render it difficult to separate one from the other, whether it be similar things with similar, such as milk with milk, or wheat with wheat, or dissimilar things with dissimilar, such as oil of sesaman with oil of olives, or wheat with barley, Abú Hanífah is of opinion that the deposit is destroyed, and that the depositary is therefore answerable for it; but Abú Yúsuf and Muhammed hold, that in the first of these cases the destruction is merely apparent and not real, and that, consequently, it shall be left to the option of the depositor whether he will receive a part of the things mixed as his deposit, or a compensation in lieu. In the other case the destruction is both apparent and real; and, therefore, the depositary becomes responsible. If,

[1] That is, whether diligently or negligently.

however, the deposit and the property of the depositary become mixed from any accident, not attributable to fraud on his part, he is not responsible.

The unlawful acts which render a depositary responsible for a deposit, are the converting it to his own use, or to the use of a third person, and the refusing to deliver it, or denying that it was intrusted to his charge, when duly demanded by the depositor. In the first of these cases it is held, that the responsibility ceases whenever the depositary ceases to make use of the deposit, provided that it remain in exactly the same state in which it was delivered to him. In the other case the depositary continues answerable as long as he unlawfully detains the deposit. If, however, two or more persons make a joint deposit, it is held that the depositary is not obliged to return it unless it be demanded jointly by the depositors; but if the deposit be divisible, he is at liberty to give each of them, on demand, his share of the deposit.

2. The validity of a contract of pledge depends on the agreement of the parties, and on the delivery of the pledge into the possession of the pawnee. Nothing, therefore, can be a pledge but what admits of delivery; and until delivery has actually taken place, the contract is not considered to be executed, and either of the parties may therefore recede from it. But as soon as the pledge is placed in possession of the pawnee, he becomes responsible to the amount of the debt *in all cases* for its safe preservation.[1] The law also specifically restricts him from making use of the pledge in any way, either by residence, service, or clothing, from hiring and lending it, and from selling it without the consent of the pawner; if, therefore, the pledge be lost or destroyed, its value estimated at the lowest price of the article when pledged is considered as a set-off to the debt due to the pawnee. Should the one be equivalent to the other, the pawnee loses all further claim on the pawner; but if the value of the pledge be less than the debt, the balance must be paid by the pawner; and in case of the value of the pledge exceeding the debt, the excess remaining in the hands of the pawnee is held to be the same as a deposit, and subject to the same degree of responsibility.

A pledge does not bar an action of debt; and the pawnee may therefore bring a plaint before the *Kází*, and require the payment of the debt, or the imprisonment of the debtor: in this case the pledge must be produced.

[1] Sháfi'í dissents from this opinion, and holds that a pledge is the same as a deposit, and that the pawnee is therefore not answerable for it.

3. I have already mentioned the general nature of sale; but there are a few particular circumstances relating to the contract which it may be necessary to notice. The Muhammedan law considers, as a general principle, that delivery of possession is an essential requisite in the transfer of property; but necessity has occasioned a deviation from this principle in buying and selling, and the law therefore permits sales to take place without delivery of either the article sold or the price. A *chose in action* is thus created, the right to which depends chiefly on the agreement made between the vendor and the vendee; for if the vendor propose a delay previous to finally concluding the bargain, and the vendee agree to this condition, the right in the goods sold remains during the time agreed upon in the vendor; and should they continue in his possession, and be either lost or damaged, the contract of sale is *ipso facto* annulled, and the vendee is not liable for the price. But if the goods have been delivered to the vendee, he is not allowed to use them; and should they, while in his possession, be lost or damaged, he is responsible for the value: but if the vendee has proposed the delay, he is liable for the price. In all such cases of conditional sale, if the stipulated period expire without either the vendor or vendee making any objection, the bargain is held to be concluded; but if the party, by whom the sale or purchase was made conditionally, wish to annul the bargain, he must give notice of his intention to the other party previous to the expiration of the stipulated period: for if the term expire without such notification, the bargain is considered to be concluded. In the same manner the price may be either delivered on receipt of the goods, or it may be paid in advance, or after a certain time: in the two last cases it becomes a debt due either by the vendor or vendee. The law requires, that in all sales in which the instant delivery of the goods and price does not take place, the quantity and quality of the goods, and the time of delivery, and the amount of the price, and the date on which it becomes due, should be clearly defined and specified, in order to prevent all future disputes.

But the law, at the same time, permits the vendee to return to the vendor all goods which may prove defective, either in the quantity or quality agreed upon, and to demand back the price; nor does it limit this option to any specific time after delivery, as the goods may be returned at any time after the purchase, provided that they remain in the same state as when delivered. In the case, however, of goods ordered from a manufacturer or workman, for which the price has been advanced either in whole or in part, a difference of opinion exists amongst the Muhammedan jurists, respecting whether or not the per-

son who orders them has the liberty of rejecting them, should they prove defective either in measure, quantity, or quality. ABÚ HANÍFAH is of opinion, that both the orderer and the manufacturer have the option of performing or not performing this agreement; ABÚ YÚSUF, that neither of them has any option, and that therefore the manufacturer must deliver the goods, and the orderer must receive them. But the most correct opinion is that of MUHAMMED, which is, that whosoever orders any goods has the option of taking or rejecting them in case of defect; that the manufacturer has no option, but must deliver them if required; and that he is not entitled to the price of the goods if they be rejected.

4. Partnership is of three kinds: 1. Where two or more persons agree to join their property together, but not for the purpose of commerce. In this kind of partnership the partners are not responsible for the acts of each other, as they are still considered in law as separate persons; nor can one partner perform any act with respect to the shares of the other partners without their permission. Each partner thus retains a distinct right in his own share, and he may therefore convey it in any manner he pleases. 2. Where two or more free persons of years of discretion, professing the same religion, and possessing an equality of property, agree to join their monied capitals[1] together on condition, which condition must be expressly stipulated in the contract, of reciprocal responsibility. By such a contract the partners become bound in law, both as the agent and the security of each other; all legal acts of the one are therefore binding on the other, and each of the partners is responsible for the debts which may be contracted, on whatever account, by the others. Whatever also is purchased must be equally participated, except clothes and articles of food; but the vendor may claim the price of these from any one of the partners. In case the capital of any of the partners becomes increased, either by legacy or inheritance, the partnership is *ipso facto* dissolved. 3. Partnership in commerce, which may take place either between

[1] I must acknowledge that I do not clearly understand the distinction drawn by the Muhammedan jurists between a capital consisting of cash and one consisting of stock, on which several rules and much subtle reasoning are founded. The following is one of their arguments, which I give in Mr. HAMILTON's words: — "If a contract of reciprocity in goods and effects were held to be legal (as maintained by MÁLIK), it would necessarily induce a profit upon a property concerning which there is no responsibility; because upon each partner in reciprocity selling his own particular capital (consisting of goods and effects), if the goods of one partner produce a greater price than the goods of the other, the excess of profit upon the goods of the former would be due to the latter; and this would be a profit from property for which the person who gains by it is not responsible, and in which he has no right:

merchants or artificers. This is a contract between two or more individuals, by which they agree to join their property together in order to form a joint stock, for the purpose of trading in some one particular article, or of trading in general. This contract may even take place when the parties have no property of their own, and therefore raise their capital and carry on their trade at first on credit. It is not requisite that either the capital or the share of the profits of each partner should be equal, nor that each partner should contribute the whole of his property to the joint stock. By this contract each partner is considered in law to be the agent, but not the security of the other partner: all acts, therefore, relating *bonâ fide* to the partnership, and all debts incurred on account of the partnership, are binding on all and each of the partners; but in case of debt, the action must be brought against the partner individually who purchased the goods or received the loan; for if the other partners deny that the debt was incurred on account of the partnership, the partner incurring it is alone responsible, and the creditor is to be satisfied from that partner's property, should he possess any independent of the joint stock, or if not, from his share of the joint stock. The partners, also, are not individually or jointly responsible any further than the amount of the joint stock, and their separate property cannot be affected by the debts of the partnership. When the partnership is between the artificers, all the partners are responsible for the work which has been contracted for with any one of them; and the employers may require the performance of it from any of the partners, and any of the partners may demand the price of it from the employer.

5. Loan is the gratuitous transfer of property, either transiently or absolutely, by one person to another, and is divided into loan for use, and loan for consumption. In the first case, the borrower is subject to the same degree of responsibility as a depositary; and if therefore the thing borrowed be lost or damaged, whether while in

because in this instance the contract is connected with actual goods, and not with the semblance of them, such as debts; and the goods are a trust in the hands of each partner respectively: whence it is evident that a profit is induced upon property, concerning which there is no responsibility. It is otherwise with cash; because whatever either partner may purchase with the capital stock, consisting of cash, the purchase thereof is not connected with the actual capital, but with its semblance, namely debt (since the price of it is a debt). Now, the purchase being connected with the semblance of the capital (namely, debt), and the other partner being also liable to be called upon for it (as a contract of reciprocity involves mutual bail), it follows that the consequence objected is not induced, since this is a property in which there is responsibility."

use or not in use, by any fraud or culpable act on his part, he is answerable for it. The lender may require it to be returned whenever he pleases, and the borrower must be at the expense of restoring it to the lender; and should he send it by a third person, and it be lost or damaged, he is responsible; but should he send it either by his own, or the lender's servant or slave, he is not answerable. A loan of consumption consists of coined money, and of such things as admit of being counted, weighed, or measured; and in such things the absolute property is immediately, on delivery, transferred to the borrower, who becomes answerable for them in all cases, and must return on demand, or at the time stipulated, an equivalent exactly similar in quality and quantity.

Discussions have taken place among the Mùhammedan jurists, not only respecting whether any recompense should be received for loans, but even respecting how far it was lawful to derive any profit from sales. Their arguments, in consequence, apply to both these points, so very dissimilar in themselves, and are therefore extremely perplexed and unsatisfactory; but had they merely referred to the principles of their own law, it would have saved them much useless disquisition: for the prophet expressly prohibits the taking of any recompense for the exchange of things exactly equal in kind and value, or for the gratuitous transfer of property whether transient or absolute; but he permits the person who purchases things for the purpose of reselling them, in case of his expending any labour in bringing them to market, or of his increasing their value by the addition of any work or property of his own, to receive a suitable recompense, in an enhanced price, for such labour and property.

6. Commission is of two kinds, either without or with compensation; with regard to the first it is laid down in the *Hidáyah*, that whatever act a man may himself lawfully perform, such as buying and selling, marriage, and the like, he may also lawfully perform by the means of another person, because men are sometimes unable to act for themselves from various accidents, or from want of knowledge, or conversancy in worldly affairs: but though all the Muhammedan jurists agree that an agent may be appointed for the conducting a legal process either on the part of the plaintiff or defendant, yet a difference of opinion exists among them respecting whether such an appointment depends on the absence of the party, and on the consent of the opposite party, and whether it can take place in a case of homicide, mayhem, or where the offence incurs personal punishment. The most received opinion, however, is, that none of these circumstances constitute a legal impediment to the appointment; but it is,

at the same time, held, that the confession of an agent in a legal process does not affect his principal. The validity of a contract of commission depends on the principal having lawfully the power both of performing the acts which he orders, and also of appointing an agent; and on the person appointed being legally competent to execute the agency, that is, of sound understanding, and neither a minor, nor a lunatic, nor a slave. The commission may either be special, that is, restricted to a particular transaction or a particular time; or absolute, that is, giving the agent a general power to act in all affairs for the principal.

The obligations in law resulting from this contract are twofold; the first, that the agent is responsible for all acts done by him on account of his principal which do not relate to the principal personally; and the other, that he is not answerable for acts which affect the principal personally; for instance, in sale, contract, and the like, the agent concludes such transactions in his own name, and in case of any dispute arising, the action must be brought against the agent and not the principal; but in cases of marriage, divorce for a valuable consideration, and the redemption of blood, the name of the principal is alone used, and he alone is responsible; at the same time the acts of the agent are binding on the principal, provided that he does not act contrary to his instructions, and the principal must in consequence make good to the agent whatever loss or expense he may *bonâ fide* incur in the course of the agency: the agent also may detain any thing which he has purchased for the principal until he pays the price of it; but should the thing while so detained be either damaged or lost, the principal is not obliged to pay for it. This contract may be dissolved whenever the principal pleases, but he must give due notice to the agent; and it legally ceases in the case of the death, the lunacy, or the apostasy, of either the principal or the agent.

Commission with compensation is where one person delivers to another a certain capital for the purpose of trading and intrusts him with the management of it, on condition of receiving a stipulated share of the profits. This capital is considered by the law as a deposit, and the factor is liable to the same responsibility as a depositary. Unconditional contracts of commission of this kind are not restricted as to time, place, or other circumstances; and the factor is therefore at liberty to manage the capital in any manner that he thinks proper, excepting that he cannot lend it, nor, without the consent of his principal, intrust the management of it to another person; but the principal may prescribe conditions, and should the factor infringe them he becomes responsible for the capital. The principal

may dismiss the factor whenever he pleases, but all acts of the factor are valid until he receives due notice of his dismission. During the continuance of the contract all expenses incurred *bonâ fide* for management, and all losses, are to be deducted from the profits and not from the capital; on its being dissolved the factor must, previous to rendering a final account of his management, recover all debts that may be due; and should it then appear that any part of the capital is lost, the loss falls on the principal and not on the factor, who is merely a depositary.

7. Caution,[1] which is of two kinds, caution for the personal appearance of another, and caution for property. With regard to the first a material difference of opinion exists among the Muhammedan jurists, as some of them hold that such caution is unlawful, because a man shall not render himself responsible for an act the performance of which does not depend on himself; but the received opinion is, that it is lawful, because, though the cautionary may not be able to produce the cautioner, he is still able to give the *Kází* such information as may enable him to take the necessary steps for his apprehension. It is also disputed whether such caution is lawful in cases of homicide, mayhem, and offences incurring personal punishment: this, however, seems to be merely a verbal dispute, for all jurists agree, that in these cases caution for personal appearance previous to trial and conviction is not lawful, and that substitutes are not admitted in cases of personal punishment. It must hence be evident, that though in theory caution for personal appearance may be lawful, yet in practice no case is likely to occur in which it can take place;[2] because as soon as an offender is convicted he immediately receives the punishment awarded, or, in cases of homicide and mayhem, redeems his person by becoming responsible for a certain sum of money, or a certain quantity of property. This fine, in consequence, immediately becomes a debt, and the cautionary becomes, of course, a security for property and not for personal appearance. If, however, security for personal appearance be taken, the cautionary is bound to produce the cautioner on the day fixed, and to place him either in the hands of the plaintiff or of the *Kází*: should he fail in the

[1] I prefer employing the unusual words, caution for this kind of security, cautionary for him who gives it, and cautioner for him on whose account it is given, rather than the term bail used by Mr. HAMILTON; because, as it will be observed, this security does not correspond with the English law definitions either of bail or recognisance.

[2] A creditor, of course, would always prefer to receive security for the debt rather than caution for the personal appearance of the debtor.

performance of his engagement, the *Kází* is to allow him a sufficient delay for the purpose of producing the cautioner, and then if the cautionary be still unable to fulfil his engagement, he is to be imprisoned at the discretion of the *Kází*. When either the cautionary or the cautioner dies, the caution becomes null and void; but the disappearance of the cautioner does not release the cautionary from his engagement.

All jurists, however, hold that caution for property is lawful, and that it may be taken either for a specific debt, or for property not delivered at the time of concluding the contract for its transfer. In such cases the creditor or purchaser is at liberty to make his claim either against the cautioner or cautionary, and if the former satisfy the claim, the latter is released from his engagement; but if the cautioner be unable to satisfy the claim, the cautionary is held responsible for it, and is considered in law to be in exactly the same situation as a debtor; but if the claim be made at first against the cautionary, and he satisfy it, the cautioner becomes bound to him for the amount. Caution for property is not dissolved by the death of the parties, and the heirs or executors of the creditor may therefore demand the debt from the cautioner or cautionary, or from their heirs.

III. Contracts relating to houses and lands. With respect to the first the contract may either be of sale, which is subject to the same rules as govern the sale of other things, or of hiring. In the latter case, the tenant concluding the contract is bound for the rent though he should not reside in the house; but if a person hire a house and then discover a defect in it, he is at liberty to dissolve the contract, unless the lessor repairs the defect. If, also, the house fall to decay the contract is dissolved. It is, likewise, held, that if the lessor become involved in debt to such an amount that it cannot be liquidated except by the sale of a house which he has let, the *Kází* must dissolve the contract and direct the house to be sold. If the manner of paying the rent be not specified in the contract, the lessor may demand it day by day.

The validity of a contract affecting land depends on the following conditions:—1. That the land be capable of cultivation; 2. That the contracting parties be of sound understanding and of years of discretion; 3. That the terms of the contract, and the period for which it is to endure, be clearly specified; 4. That it be expressly stipulated which of the parties is to furnish the seed, in order that it may be known to which of them the produce is to be ascribed; 5. That the share of the party who does not furnish the seed be expressly stipu-

lated; 6. That the particular kind of seed which is to be sown be expressly stipulated; 7. That the landholder deliver the land to the cultivator, and intrust him with the sole management of it; and 8. That the landholder and cultivator divide between them the produce of the land. The validity of the contract must also depend on one of the four following conditions:—1. The one party may contract to furnish the land and the seed, and the other party the labour and the cattle; 2. One party may furnish the land only, and the other the labour, the seed, and the cattle; 3. One party may furnish the land, the seed, and the cattle, and the other labour only; or, 4. One party may furnish the land and the cattle, and the other the seed and the labour. But if an agreement be made that one party shall furnish the land, the cattle, and the labour, and the other the seed only, or that one party shall furnish the land and the labour, and the other the seed and the cattle, the contract is not valid. The contract is also invalid if its terms depend on a contingency, for instance, on a certain number of measures of grain, for it is possible that the land may not produce so many.

In all cases when the contract is valid, the produce of the land is the joint property of the contracting parties, and is to be divided into such shares as have been agreed upon, as a half, a third, or the like; but if the land produce nothing, then the cultivator is not entitled to any thing, because, according to the terms of the contract, he is entitled only to a share of the produce. When, however, the contract proves invalid, the crop belongs to the party who furnished the seed; if this be the landholder he is bound to pay a suitable hire to the cultivator for his labour, which is not to exceed the profit that he would have derived from the contract had it been valid; and if the seed have been supplied by the cultivator, he is bound to pay, under the same restriction, a suitable rent to the landholder for the use of the land. Every agricultural operation previous to the grain being ripe falls upon the cultivator; and every subsequent operation, until it is finally divided between them, falls equally on the cultivator and the landholder. After partition the partnership is severed, and each of the parties manages his share at his own expense.

After concluding a contract of cultivation, if the party who is to furnish the seed refuses to fulfil his engagement, the *Kází* must not compel him to adhere to it; but if the party who is not to supply the seed retracts, the *Kází* may compel him to execute the terms of the contract. It is, at the same time, lawful for the landholder to sell the land, the subject of the contract, in case of debt; and, should the crop not have appeared above ground, the cultivator is not entitled to

any recompense for his labour in having tilled it; but if the crop have appeared above ground the sale must be deferred until it is reaped. The contract, also, is legally dissolved by the death of either of the parties; and if this take place previous to the crop appearing above ground, the contract ceases at once, but otherwise it does not cease until the crop has been reaped.

It is equally lawful to contract with another person for the cultivation of fruit-trees, vines, herbs, and roots; and, the same rules with respect to the profits, the expenses of cultivation, and the dissolution of the agreement, apply to this contract as have just been mentioned.

Leases of land are considered by the Muhammedan law as contracts of hiring, and the same general principles are therefore applicable to each. The term of the lease, the rent, and the particular purpose for which the land is leased, must be clearly specified in order to render the contract valid; but it is not necessary to specify the road leading to the land and the water, because these are inseparable from the use of the land. The particular kind of cultivation must even form part of the terms of agreement, for some modes of tillage are injurious to the land, and some are not so. If, therefore, a person hire land on condition of cultivating wheat, and he sow therein grass or grain, which impoverishes the soil more than wheat, he acts contrary to his agreement and is therefore answerable; the lessor, consequently, may claim a compensation for the injury, but if he adopt this remedy he is not entitled to rent, because the lessee is in the situation of a dispossessor. Should a person hire land for the purpose of building or planting, he must, at the expiration of the lease, remove his buildings and trees, unless the land is liable to sustain an injury from the removal, in which case the landholder is at liberty to give an equivalent, and to appropriate the buildings and trees without the lessee's consent, or unless the landholder purchases them or allows them to remain on his land: it is otherwise when land is hired for the purpose of tillage, and the term of the lease expires before the grain is ripe, for in such case the grain must be allowed to remain on the land, at a suitable rent, until it be fit for reaping.

Land not being held of a superior, or subject to services of any kind, is sold exactly in the same manner as any other thing. It may, however, be observed, that in the sale of land the trees upon it are included, though not specified, because they are joined to it; but grain and fruit on the trees are not included unless expressly specified: the seller, however, must clear them away immediately whether they be ripe or unripe, unless he makes a particular agreement with the purchaser for their continuance on the land.

The preceding are all the kinds of contract known to the Muhammedan law.

UNJUST PARTITION OF JOINT PROPERTY.

The partition of joint property may be enforced by the *Kází*, and it is therefore incumbent on him to appoint persons just, upright, and conversant in the business, for the discharge of this duty. This being a benefit which extends to all Moslems, the subsistence and expenses of partitioners ought to be defrayed from the public treasury, for the public treasury is the common property of the true believers; but should any circumstances prevent their receiving a public salary, the partitioners shall be paid by the sharers in the property which they divide, and the *Kází* must fix exactly the fees to which they are entitled, in order that all unjust demands may be repressed. A public salary, however, is preferable, because it removes all suspicion of partiality or corruption. The *Kází*, also, must not always appoint the same person or persons to make partition, nor allow the partitioners to enter into a monopoly, for in either of these cases it would enable the individual or individuals to demand an exorbitant and illegal compensation for their services.

It is, at the same time, lawful for the joint-tenants to divide the joint-property amicably amongst themselves, and after such partition no one of them is at liberty to complain of error in the share allotted to him; but, when the partition has been made by the authority of the *Kází*, any of the joint-tenants may prefer a complaint in case of sustaining an injury either from the negligence or the fraud of the partitioners. The *Kází* may, in all cases wherein the joint-property consists of similar things, or of things which are after partition capable of being converted to use, on the petition of any one of the joint-tenants, direct the property to be divided; but in all cases wherein the property consists of dissimilar things, such as camels and goats, rubies and diamonds, and the like, or where the partition of the property will either diminish its value or render it useless, the *Kází* cannot order it to be divided unless all the joint-tenants consent. In the case of houses, however, though they are impartible, yet a particular share in the entire house shall be assigned to each of the joint-tenants; and in the case of fixtures on land, the tenant in whose lot these are included must give to the other tenants an equivalent in money.

In dividing joint-property the partitioners must carefully ascertain its quantity or extent, and its precise value; he must next divide it into proportions equal to the smallest share: thus, if an estate is to be

divided between two heirs, the one a son and the other a daughter, the estate must be divided into three shares, the son being entitled to two, and the daughter to one; the partitioner is then to write their names upon billets, and to cause them to be drawn like lots. Should the son's come up first he takes the two first shares, and the daughter the third; and if the daughter's name come up first she gets the first share, and the son the second and third. This mode of determining the shares by lots is recommended in order to give satisfaction to the parties, and to prevent the effects of partiality or corruption on the part of the partitioner; but it is not legally necessary, and if, therefore, the partitioner assign a particular share to each joint-tenant the partition is valid. In all cases after partition, if any part of the joint-property prove to be the right of another person the partition becomes null and void, and the tenant affected may either accept an equivalent from the other tenants, or demand that the residue shall be divided again.

With regard to joint-tenancy in property which is impartible, there is nothing laid down distinctly in the *Hidáyah*. It would seem, however, that the manner in which it is to be used depends on the mutual agreement of the joint-tenants, and that the authority of the *Kází* is restricted to the compelling them to enter into such an agreement, and the enforcing the due performance of its terms.

DISPOSSESSION.

Dispossession is the depriving another without his consent of the possession of a thing which belongs in right to him. In this case the dispossessor becomes, immediately on taking the property, responsible for it; and if it be damaged or lost, whether by an act of his own or the act of another, he is bound to give a compensation for it equal to its value on the day when it was taken: but, if possible, it is requisite that the identical thing taken be restored by the dispossessor; and if, therefore, on a complaint being made, he cannot prove to the satisfaction of the *Kází* that it no longer exists in its original state, the *Kází* must imprison him until he produces it, or until he proves that it is not in his power to produce it: when, however, the thing taken has been changed, the right in it becomes vested in the dispossessor, and the proprietor is then only entitled to a compensation. But, as no agricultural operation can alter land substantially, if a dispossessor plant trees on the land of another, or erect houses on it, he is bound to remove such trees and houses, and to restore the land in its former state to the proprietor. In this case the trees and houses are allowed to be removed because they are the property of the dis-

possessor, and because the proprietor is not entitled to any compensation, as he receives back his land uninjured. Should, however, land be damaged by such an act, or by the manner in which it has been cultivated by a dispossessor, the proprietor is entitled to compensation. The same rule applies to houses, for if they be restored in their original state the dispossessor is not subject to the payment of any compensation; but if the houses, the fixtures, or furniture, be damaged, he becomes answerable. The dispossessor, however, is not responsible for the produce or the profits arising from the thing taken; and these, therefore, being unjustly acquired, the Muhammedan jurists recommend to be expended in acts of charity.

JUDGMENT AND EXECUTION.

It will be apparent from the preceding remarks, that in all litigations respecting property the judgment awarded can be productive of only two effects, either that the identical thing which is proved to be the property of the plaintiff shall be restored to him by the defendant, or that whenever such restoration is impossible, the plaintiff shall receive an equivalent from the defendant. In the first case, the former is put in immediate possession of the thing to which he has proved his right by the officers of justice; and, in the other, the compensation is considered by the Muhammedan law to be exactly the same as a debt. It is, at the same time, expressly laid down, that this compensation must never exceed the value of the actual loss sustained, and therefore the inconvenience or actual injury which may result from the non-performance of a contract, or the unjust detention of property, are never taken into consideration; for it is held that the plaintiff in such cases, by recovering his right, is not entitled to any further redress, and damages are in consequence unknown to the Muhammedan law.

But the most usual consequence of judgment is the constituting a debt, the payment of which must be enforced from the defendant; if, therefore, the defendant, after judgment has been passed, refuse payment, he is to be immediately imprisoned by the *Kází*, provided that he does not plead inability to discharge it on account of his poverty. This rule extends to all cases in which it has been adjudged that the defendant, whether as principal, agent, or cautionary, shall pay a compensation to the plaintiff, and on whatever account it may have been awarded. A husband, also, under the same restriction, may be imprisoned for not furnishing his wife with necessaries, and a father for not furnishing his children under age with necessaries; should, however, the defendant plead poverty, the *Kází* shall not

imprison him unless it is proved either by strong presumptions (such as the debt due having been contracted for goods delivered, or his having voluntarily become a cautionary for the performance of a contract), or by evidence adduced by the plaintiff that the defendant is actually possessed of property. In the latter case the *Kází* must direct inquiries to be made into the real circumstances of the defendant, and should it then appear that he is unable to pay the debt on account of poverty, he must release him; but should it appear that he is rich, he must continue his imprisonment. If, however, no satisfactory information can be obtained on this point, the *Kází* is at liberty to detain him in prison for such a period as he may think sufficient for inducing the defendant to discharge the debt were he in fact possessed of property. It is observed in the *Hidáyah*, that in this case a precise period cannot be fixed, because men are differently affected by the hardships of imprisonment, and that it must, therefore, be necessarily left to the discretion of the *Kází*. Should the debtor thus imprisoned fall sick and have any person to attend him, he is not to be released, but otherwise he must be released; and if the debtor be an artificer he is not to be allowed to work at his trade.

If a debtor possess property, a difference of opinion exists among the Muhammedan jurists, respecting whether or not the *Kází* can order such property to be sold for the satisfaction of the creditors without the consent of the debtor. Abú Hanífah maintains that he cannot, and that he can only have recourse to imprisonment in order to compel the debtor to adopt means for the discharge of his debts; but Abú Yúsuf and Muhammed hold that the debtor's consent is not necessary, and that the *Kází* may therefore sell whatever property he has, either in whole or in part, and divide the proceeds amongst the creditors in proportion to their respective claims: but whenever a distribution and sale of the debtor's property take place, it is held that the cash shall be first divided, then the proceeds arising from the sale of his goods and effects, and lastly, the proceeds arising from the sale of his houses and lands. If, after such a division, no residue remain to the debtor, a certain proportion of the property must be set apart for the maintenance of himself, his wives, and such of his children as are under age.

The liberation of a debtor from prison in consequence of poverty does not cancel his debts; and the creditors are, therefore, at liberty to inspect and watch his conduct, in order that they may seize the first opportunity of obtaining a liquidation of their demands. They must not, however, impose any restraint on his actions, or enter his house, or prevent him from transacting business or travelling; but

they may insist on his regularly paying them all that he gains over and above what is requisite for the subsistence of himself and his family. In this case, whenever there is more than one creditor, all the creditors must agree to receive their debts in this manner, and must divide what is paid by the debtor in proportion to their respective claims. If the debtor, rather than subject himself to the importunities of his creditors, prefer remaining in prison, and the creditors require his release, the *Kází* must comply with their demand; but if they in any manner abuse the liberty given them of watching the debtor, the *Kází* must commit him again to prison.

PART IV.

PUBLIC WRONGS.

In treating this part of the subject, it will, perhaps, be best to commence with the smallest offence, and proceed to the highest crime. The offences, then, known to the Muhammedan law may be divided into, 1. Misdemeanors; 2. Theft; 3. Homicide and mayhem; 4. Adultery; 5. Highway robbery; 6. Rebellion; and 7. Apostasy.[1]

MISDEMEANORS.

All acts which are offensive, either in word or deed, are deserving of punishment; but as the specification of such acts, and of the penalty which ought to be incurred by each of them, is impossible, the law has only enacted specific provisions for offences of the greatest importance, and has intrusted the correction of all other culpable acts to the discretion either of individuals or of the magistrate: for a father may chastise his child, a husband his wife, and a master his slave; and it is even held by some jurists, that any Moslem, when he observes another committing an improper act, may correct him. But in the last case the most received opinion is, that punishment, of whatever degree it may be, can be inflicted by the magistrate alone. A complaint must, therefore, be made to the *Kází*, which, unless he

[1] It ought, perhaps, to be remarked, that the Muhammedan law divides public wrongs into five classes: 1. Apostasy; 2. Crimes against the prince, which include highway robbery and rebellion; 3. Crimes subject to *kisas*, or retaliation, which include homicide and mayhem. 4. *Hudud*, or penalties prescribed by the Korán for certain offences, viz. theft, adultery, fornication, drinking intoxicating liquors, and *kazf*, or falsely accusing a woman of adultery; and 5. *Ta'zir*, or discretionary punishment for petty offences, and such as are not comprised in any of the preceding classes.

has himself been an eye-witness of the circumstance, must be duly proved by evidence. In the *Hidáyah* no particular instances are given of the offences which are subject to discretionary punishment, because it depends entirely on the *Kází* to determine whether the act complained of is of that nature or not.[1] If he decide that it is, he may direct the offender to be whipped or imprisoned, or both. In the first case, the number of stripes is never to exceed thirty-nine, nor be less than three; and it is laid down, that as the number is so small no lenity ought to be observed in inflicting them. The term of imprisonment is left to the discretion of the *Kází;* but it would seem to be the general opinion that it ought not to exceed two or three months.

There are, at the same time, three misdemeanors for which the law has prescribed a specific punishment; namely: 1. Drinking intoxicating liquors; 2. Fornication; and 3. *Kazf*, or falsely accusing a woman of adultery.

1. With regard to the first: if a Moslem drink wine, and be brought before the *Kází* either when he is intoxicated, or when his breath retains the smell of the wine; or if his drinking it be proved by his own confession, or by the evidence of two witnesses, the *Kází* shall order him to be punished with eighty stripes.

2. Every unlawful connexion between a free man and a free woman that does not amount to adultery. To prove either a man or a woman guilty of this offence, it is indispensable that four respectable men, of sound understanding and of years of discretion, testify that they were eye-witnesses of the fact. The *Kází* must be particularly careful, in receiving evidence to this offence, to ascertain that the witnesses are both credible and competent; but should it be satisfactorily proved, he must order each of the offenders to be punished with one hundred stripes.

3. *Kazf.* Whenever any person accuses a married woman of adultery, and cannot support his accusation by the legal number of witnesses, or whenever any person makes use of expressions calling in question the chastity of the mother or the wife of another, he shall,

[1] In the Persian version, published at Calcutta, of that part of the *Fitawi Alumgiri*, which relates to offences, the following instances are given; striking a Moslem, knocking his turban off his head in the bazár, false imprisonment, &c.; or calling a Moslem an infidel, a liar, a thief, &c. But it is doubted whether calling him an ass, a hog, or a similar name, is punishable, because it is self-evident that he is neither the one nor the other. It is added, that the making of any writings or pictures, which are intended to expose a Moslem to ridicule, are also punishable.

on complaint being duly made to the *Kází*, be punished with eighty stripes,[1] and be declared to be ever after incompetent as a witness.

THEFT.

Theft is the secretly taking the goods of another to the value of ten dirhems (about twelve shillings and sixpence) or more, when in safe keeping. Under this definition is included both the larceny and the burglary of the English law, but it applies particularly to the latter; for it is observed in the *Hidáyah*, that thefts are not likely to take place in the day-time, on account of assistance being always at hand, but that as assistance is seldom procurable at night, thefts are most commonly committed at that time, the thief availing himself of that opportunity to enter houses and forcibly take away the goods of the owners. The Muhammedan law, at the same time, admits so many exceptions to the general definition of theft, that the real character of this offence may be much easier ascertained from these exceptions than from the rule itself.

For taking from any relation within the prohibited degrees, or from a master or mistress, or from a host, does not amount to theft; nor is it theft for a creditor to take the amount of his debt from his debtor, or for a depositary to appropriate the deposit intrusted to him. If the goods also be openly snatched or taken away, or taken from a place which is not considered in law as a place of safe keeping, it does not amount to theft. On this last point the proof of secretly taking principally depends; and it is, therefore, to be observed that the law considers safe keeping to be of two kinds—either the place, such as a house, or a warehouse, or tent; or the personal watchfulness of the owner, as where a man sits in a public place having his goods about him; and in this case no distinction is made between the owner being asleep or awake, or his having his goods about him or under him.[2] But taking from a public bath, or from a house to which the owner admits all people to have free ingress, as a shop or caravanserai, is not theft, if the goods be taken during the hours when the house is open to the public, but otherwise

[1] In the *Hidáyah*, it is laid down that the stripes ordered by the *Kází* shall, on all occasions, be inflicted with a whip (or rod) without knots; that a man shall receive them standing, and naked to the waist; and a woman sitting, and her outer garment only taken off. They must be inflicted moderately, neither with too much severity nor too much lenity; and if the offenders be sick, or intoxicated, or pregnant, the punishment must be delayed until their recovery.

[2] This, of course, applies *a fortiori* to goods taken actually from the person.

it is theft. The taking also of things of trifling value, as wood, grass, fish, fowls, and garden-stuff, does not constitute theft; nor of things which quickly decay, as milk, flesh-meat, or fruits, whether gathered or on the tree.

Taking from the public treasury is not theft, because it is the common property of all Moslems, and the taker consequently has a share in it; for if a person take from property in which he is a joint tenant, it does not constitute theft.[1]

If, however, it be proved by the confession of the offender, or by the evidence of two witnesses, that he has secretly taken goods of ten dirhems' value or upwards, and that he cannot plead any of the preceding circumstances in bar to his conviction of theft, the *Kází* must order his right hand to be cut off. The amputation is to take place at the joint of the wrist; and the wound is to be immediately cauterised, because it might otherwise prove fatal; and the punishment is inflicted for the purpose of warning and deterring others, and not of putting the offender to death. If the thief commit theft a second time, his left foot is to be cut off in the same manner; but if he offend a third time, he is to suffer no further mutilation, but to be imprisoned until such time as he repents, or during the rest of his life. Should the right hand and left foot of the offender be useless from any cause, or have been lost by accident, the left hand and right foot shall not be cut off in their place, but the offender must be imprisoned. A sentence of amputation cannot be awarded or carried into effect, unless the owner of the goods stolen has appeared as prosecutor, and is present at the execution; nor is the thief, on whom such a sentence is passed, responsible for the goods stolen, though, if they be still in his possession, they must be restored to the owner; and if the owner make a gift of them, or sell them to the thief, previous to execution, the sentence shall not be carried into effect: for it is indispensable that at the very time of execution the punishment should depend on the right of another being actually invaded; and the transfer by the owner of the stolen goods to the thief previous to execution is exactly the same as if he had transferred them previous to bringing his plaint before the *Kází*.[2]

[1] In all these cases, however, where the offence does not amount to the legal crime of theft, the offender is liable to such discretionary punishment as may be adjudged by the *Kází*.

There is a remarkable inconsistency in the definition of punishment given by Muhammedan jurists; for it is at one time considered as authorised by God, in order to deter men by its example from sin; and at another, as in the present instance, as due to individuals, in consequence of any injury that they may have

If several persons are concerned in a simple taking, that is, when they do not enter a place of safe keeping, the act does not amount to theft, unless the value of the goods is such as to admit of each of the accomplices receiving ten dirhems; but if several persons enter a place of safe keeping, or if one or more enter it and the others stand by, all the party is to suffer amputation: because it is customary for some to commit the theft, and for the others to keep watch, and were therefore all the accomplices not liable to have their hands cut off they would escape punishment. This remark is founded on the following instance:—If a thief forcibly enter a house, and take goods and deliver them to an accomplice standing on the outside, the hands of neither of them shall be cut off; because the thief who entered the house did not carry the goods away, and the other did not take them in the house, and, consequently, did not violate a place of safe keeping. But if the thief who enters the house throw the goods outside, and then carry them away himself, or by the means of a beast of burden, his hand is to be cut off; but if he go away without carrying the goods with him, he has not committed theft. A difference of opinion, however, exists respecting whether or not a thief who does not enter a place of safe keeping, but merely introduces his hand and thus takes goods, is liable to amputation; but the general opinion seems to be that he is not, because he has not committed a complete violation of the place of safe keeping.

HOMICIDE AND MAYHEM.

As the different kinds of homicide which are recognised by the Muhammedan law are arranged in a very perplexed and unsatisfactory manner, it will be best to divide it into, 1. Wilful murder; 2. Unintentional homicide; and, 3. Justifiable homicide.

1. Wilful murder is the killing another intentionally with a weapon, or with the substitute of a weapon, as a sharp stick, or a sharp stone, or fire; but as the intention is concealed, it can be known only by a visible act, and the law therefore concludes, that whoever uses

sustained. Had they adhered to the first definition in the case of theft, it is evident that the mere transfer of the right in the goods stolen to the thief could not possibly alter the criminality of the act, and that he was therefore still liable to punishment, in order to serve as an example to others; but if punishment be the right of individuals, it necessarily follows that they may either claim or abstain from claiming it. There is, at the same time, a peculiar, but humane, subtilty in considering the judgment of the *Kází* as complete in itself without execution, since by it is fully established the right of the claimant, and it then remains to the latter to remit or enforce the execution.

against another an instrument of murder, it must be with the intention of murder. The consequences of wilful murder are, damnation in the next world, and retaliation in this world; for the prophet hath said, *Whoso killeth a believer designedly, his reward shall be hell: he shall remain therein for ever:* and also, *O true believers! the law of retaliation is ordained you for the slain; the free shall die for the free, and the servant for the servant, and a woman for a woman; but he whom his brother shall forgive may be prosecuted, and obliged to make satisfaction according to what is just, and a fine shall be set upon him with humanity.*[1]

Retaliation is incurred by the Moslem who wilfully murders a Moslem, or a tributary (but not an alien), or a child, or a slave (whether man or woman), and whether the person slain be blind, infirm, deprived of any of his members, or insane. The parent, that is, the father and mother, and all ancestors, shall not be slain for the child; and whenever the right of retaliation in a parent devolves by inheritance, the right ceases: but the child shall be slain for the parent. A master does not incur retaliation by the murder of a slave belonging to himself or his child, or in whom he has a joint property. If several persons unite in committing a wilful murder, each of them, whether he has actually struck the blow or merely stood by, incurs retaliation;[2] but in all cases the right of retaliation ceases on the death of the murderer.

The crime of wilful murder is proved by the confession of the murderer, or by two witnesses adduced by the heirs of the deceased. If, however, the witnesses disagree with respect to the time or place of the murder, or the instrument with which it was committed, their testimony must be rejected; or if one witness depose to the instrument, and the other declare his ignorance of it, or if the one say that it was a sword, and the other that it was a knife, the murder must be considered as not proved; for it is on the particular kind of instrument[3] with which death has been inflicted that the crime of

[1] This passage applies to wilful murder; for MUHAMMED has said in another place, *It is not lawful for a believer to kill a believer, unless by mistake.*

[2] The Persian translator of the *Fitawi Alumgiri* asserts, on the authority of the *Jama ul Remúz*, that none of the accomplices in a wilful murder, except those who actually inflict the mortal blow, are subject to retaliation: but this opinion is certainly contrary to the received doctrine of Muhammedan law.

[3] ABÚ HANÍFAH maintains, that drowning another, or causing his death by any other means than that of a weapon or its substitute, is not wilful murder; but ABÚ YÚSUF and MUHAMMED are of opinion that it is, and their arguments apply equally to all other kinds of violent death in whatever manner it may be inflicted, otherwise than by a weapon or its substitute. It is also evident that the prophet

wilful murder depends; and if, therefore, the witnesses depose that they know not what the instrument was, the person accused is to be convicted of unintentional homicide only.

Retaliation is the right of the heirs of the deceased, and when the murder is proved by the requisite evidence, the murderer must be delivered up to them. It is then left entirely to them to determine whether they will put him to death, or accept a compensation in lieu of the blood of their relation. In the first case, the murderer is to be slain at once with a sharp instrument capable of inflicting instant death, and is neither to be mutilated nor tortured in any manner.[1] In the latter case the law has fixed no amount of money or goods as the redemption of wilful murder; and the composition, therefore, depends on the agreement which may be made between the heirs of the deceased and the murderer. It is only required that the murderer should consent to the agreement, because he cannot be obliged to enter into it. Should he accept the composition, the amount must be immediately paid unless the heirs consent to a delay; in which case the compensation becomes a debt, and is therefore subject to the same rules which have been already detailed regarding caution and the means of enforcing payment. To prevent, however, all inconvenience which might arise from a difference of opinion amongst the heirs of the deceased, in general so numerous, the law holds, that if any one of them pardon or commute the crime of murder, the act is binding on all; but in case of a compensation having been received, each of the heirs is entitled to a share of it.

2. Unintentional homicide is divided by the Muhammedan jurists into four kinds: 1. Where a man kills another by striking him with an instrument not likely to cause death, as a whip or small stick; 2. Where a person doing a lawful act, without any intention of hurt, unfortunately kills another; as if a person were shooting at a mark,

does not, in any place of the *Korán*, restrict wilful murder to a particular mode of killing; for his expression is general—*whoso killeth a believer designedly*. The means, however, by which the violent death was caused must be proved, according to all Muhammedan jurists, in order to convict a man of wilful murder. It may be proper to add, that the Muhammedan jurists, in describing what I have termed wilful murder and unintentional homicide, have adopted the very terms which are used in the *Korán*. متعمدا, *designedly*, and خطا, hence قتل عمد, *killing by design*, and قتل خطا, *killing by mistake*; the only two distinctions found in the *Korán*.

[1] In opposition to the jurists of the Hanífah sect, Sháfe'í maintains the horrid doctrine, that the very same wounds must be inflicted on the murderer that he inflicted on the deceased, and that should these not prove mortal, his throat is to be cut.

and the arrow by mistake hits a man; or in shooting at game the supposed beast should prove to be a man: 3. Where the homicide proceeds from accident, as if a man, while asleep, should fall upon another and cause his death: and, 4. Where the homicide proceeds from an intermediate cause; as where a person digs a well on land that does not belong to him, and another falls into it and is drowned. But though these different acts are thus discriminated, on account of there being greater moral culpability in one than in another, yet the punishment for each of them is the same; namely, a fine of a hundred camels, or ten thousand dirhems (about 625*l.*)[1] It will, no doubt, appear singular that the Muhammedan law should have prescribed so severe a penalty for acts which itself holds to be unintentional, and, consequently, not criminal; but it holds, at the same time, that in all these cases the committer of the homicide is not entirely faultless, because he has been in some degree, at least, deficient in the necessary caution, and particularly because that the blood of man is too sacred to allow of its being shed with impunity. The law, however, exempts the committer of the homicide from the payment of the fine, and directs it to be levied on his family, relations, and tribe; that is, all descended from a common ancestor: and should these not be sufficient to discharge it, recourse must be had to the relations by affinity, commencing with those of the nearest degree.[2] This fine is to be paid in three years, one-third each year; and no individual is to contribute more than four dirhems. It is observed in the *Hidáyah*, that the reason for exacting the fine from the relations of a person who has killed another by mistake is, that had they been vigilant it is not probable that the homicide would have been committed; and having been thus negligent, they become responsible, and therefore are associated with him in the payment of the fine.[3]

The arranging, under this head, homicide committed by persons

[1] In the three first cases, besides the fine, the person who commits the homicide is liable to expiation; that is, the freeing a slave, or fasting for two consecutive months.

[2] The committer of the homicide also pays his proportion of the fine.

[3] This reasoning might apply correctly to the Arabs in Arabia; but when the Muhammedans and their converts became dispersed over the greatest part of Asia, it must have been rendered every day more inapplicable by the connexion of families and tribes being in a great measure dissolved: and it is therefore difficult to understand how this law could have been ever carried into effect, as the payment of four dirhems from each individual of a family present in one place could scarcely ever have amounted to the sum total of this fine. In defect, however, of a sufficient number of the family of the committer of the homicide, the vicinage might be called upon to pay the fine.

unknown, or by inanimate objects, may be considered singular; but it is rendered requisite by the Muhammedan law imposing the same penalty in these cases as in the case of unintentional homicide: for if a person be found dead in any place, and it be evident that he has been killed, the inhabitants of the vicinage are bound to pay the heirs the price of blood; and in case part of the body only be found, the fine is not to be imposed, unless it be the greater part, or the upper half with or without the head. If a dead body, with evident marks of violence, be found on a quadruped, and it be accompanied by one or more men, the fine shall be paid by his or their relations; if unaccompanied, by the nearest village: should such a discovery be made in a house, the fine is to be paid by the relations of the owner or owners; but in case of any dispute, it must be proved that the persons said to be the owners are the actual proprietors of the house. If a person be found slain in a boat or carriage of any kind, the fine is imposed on the relations of those present; if in a mosque belonging to a particular division of a town, by the inhabitants of that division; but if in the principal mosque, or in a public bazár, or on the highway, or on a bridge, the fine is to be paid by the public treasury. If, however, a murdered body be found in an uninhabited desert, or on a river, no notice is to be taken of it; but if it be found on the bank, the nearest village is responsible. In short, in all cases of homicide where the perpetrator is unknown, the price of blood is to be exacted either from the vicinage, or from the relations of those in whose hands, or in whose house, or in whose field, the body of the deceased is found.

In the case of homicide, occasioned by the fall of any building, or part of a building, which has been erected so as to overhang the highway; or the placing stones, rubbish, or water; or digging a well in the highway, or on the ground of another; the relations of the person who did any of these acts, or caused them to be done, are bound to pay the price of blood: but if, for instance, a balcony, while erecting, should fall and kill a man, the workmen alone are responsible.

3. Justifiable homicide. The Muhammedan law holds that all persons who execute the decrees of a *Kází*, whether the judgment be death, mutilation, or whipping, are exempt from responsibility; and if in the two last cases death should ensue, they are not liable to the price of blood. But this rule applies merely to execution, after trial and sentence has been passed, and I do not observe that the law has provided for any other case; if, therefore, in apprehending a criminal, or in enforcing an order of the *Kází*, resistance should be made and

homicide be the consequence, I presume that it would not be considered as justifiable, but merely as unintentional, and that the relations of all present in the affair would be obliged to pay the price of blood.

Homicide is also justifiable in self-defence; but if it be possible to effect the self-defence without killing the assailant, it is not lawful to kill him: and should the assailant, after drawing his sword and attacking, retire in such a manner as clearly indicates that he has desisted from the attack, and either the person assaulted, or any other, kill the assailant, he becomes liable to retaliation.

If any person, during the night, attempt to commit a theft in a place of safe keeping, it is lawful for the owner to kill the thief; but if he could have repelled the violence attempted, or instantly recovered the goods, if any were carried away, without putting him to death, he becomes liable to retaliation.

It would seem also, though it is not distinctly laid down in the *Hidáyah*, that if a husband find his wife in the act of adultery, and he put her and the adulterer to death, the homicide is justifiable, and he incurs no responsibility.

Mayhem. To enter into all the minute particulars which are detailed by Muhammedan jurists respecting the different injuries to the person short of death, which constitute mayhem, and the rules which govern retaliation in each specific case, must be both superfluous and uninteresting.[1] It need, therefore, be merely observed, that in all cases where an exact equality can be observed, the precise injury which the offender has inflicted shall be inflicted upon him, and that where such equality cannot be observed, the injury shall be compensated by a fine; that retaliation is not inflicted for breaking any other bones than teeth, but a fine imposed; and that, in all cases susceptible of it, the sufferer may either insist on retaliation being inflicted, or accept a compensation for the injury. It is, however, to be observed, that in cases where mayhem has been wilfully committed, the fine is to be paid by the offender, and not by his relations; and that in other cases, where the fine does not amount to one-twentieth of a full fine for unintentional homicide, it is also to be paid by the offender; but if it amount to one-twentieth, or upwards, it is to be paid by his relations.

[1] Retaliation applies to every injury that can be inflicted on the person, and admits of no exceptions as in the English law: "We have therein commanded them that they should give life for life, and eye for eye, and nose for nose, and tooth for tooth; and that wounds should also be punished by retaliation."—*Korán*, chap. v.

ADULTERY.

Adultery is the connexion of a free Moslem of sound understanding, mature age, and lawfully married, with a free Moslem woman also of sound understanding, mature age, and lawfully married. This offence must be proved by four credible and competent witnesses, who testify that they were eye-witnesses of the fact. The confession of the parties is also sufficient to establish it; but such confession must be made at four different times, and the *Kází* must be very slow in receiving it. When also witnesses bear testimony to adultery, the *Kází* must use every means in his power to ascertain whether they be men of probity and integrity; but if the offence, after every requisite precaution has been taken, be fully proved, both the adulterer and adulteress are to be stoned to death. In carrying this sentence into execution, the offenders are to be carried to a barren spot void of houses and cultivation; and the lapidation must be commenced by the witnesses[1] throwing the first stones, then the *Imám* or *Kází*, and then the rest of the by-standers. Lapidation is not suspended on account of sickness; but if a woman be pregnant, she is to be imprisoned, and the execution delayed until after her delivery.

HIGHWAY ROBBERY.

Highway robbery is, when one or more persons, confident in his or their strength and bravery, go forth for the purpose of attacking and plundering others on the highway, and put travellers in fear. It admits of four degrees of criminality: 1. When the robbers are apprehended before they have terrified, or robbed, or murdered any one; 2. When they are apprehended after committing robbery only; 3. When they are apprehended after committing murder only; and, 4. When they are apprehended after having committed both robbery and murder. In the first case the robbers must be imprisoned until such time as their repentance clearly appears. In the second, their right hands and left feet are to be cut off, provided that the share of each in the property robbed amounts to ten dirhems. In the third, they are to be punished by death, and cannot be pardoned. And in the fourth, the *Kází* is at liberty to cut off their hands and feet, and then impale them, or to impale them without mutilation, or to put them to

[1] The witnesses are to commence the lapidation, in order that if they should have erred in their testimony, or testified falsely, compunction and remorse may compel them to retract their evidence.

instant death; but in all cases where a robber is put to death, he is not responsible for the property taken.

All aiders and abettors in a robbery are to be considered equally guilty as the actual perpetrators of it; and are to suffer the same punishment.

If a robber be taken, who has neither plundered nor murdered, but merely wounded a person, he is liable to retaliation or fine, as the case may be; but if he have both plundered and wounded any one, his hand and foot are to be cut off, and he thus becomes exempted from retaliation or fine.

If a person attack or plunder another in the streets of a town, it does not amount to robbery; but if persons make an affray in a town during the day with deadly weapons, or during the night either with deadly weapons or with sticks and stones, they are to be considered and punished the same as robbers.

In the *Hidáyah* it is laid down, that if among a party of robbers there be either a lunatic, or a child under age, or a relation within the prohibited degrees of the person robbed, the punishment of the whole party must be remitted; because robbery is a single offence committed by the whole party, and if therefore any one of the robbers is legally exempted from responsibility, this exemption must necessarily extend to the rest, as he is merely part of a whole; and, consequently, as the act of one involves the whole in the same punishment, so must the privilege of one equally remove all criminality from the whole. But it is impossible to suppose that this singular doctrine could ever influence the practice of the law; for, if it had, every band of robbers would have been certain of screening themselves from punishment by merely taking the precaution of carrying a child along with them. It may, therefore, be justly concluded, that in practice the opinion of Abú Yúsuf must have been adopted, who holds, that the rule just mentioned obtains only where the lunatic or child is the actual perpetrator of the robbery or murder; but if the actual perpetrator be of mature age and sound understanding, then punishment is inflicted on the whole party, with the exception of the child or lunatic.

REBELLION.

The only crime against the state known to the Muhammedan law is, not a constructive but an actual levying of war against the sovereign. The jurists, indeed, divide the persons who openly resist the authority of the sovereign into four classes: 1. Those who, without any avowed pretext, create alarm and commit depredations on the highway; 2. Those who act in the same manner, but under an avowed

pretext,—these two classes are considered as robbers, and are subject to the penalties which have been just explained; 3. Those who oppose the sovereign in force and arms, on account of alleged tyranny and heterodoxy; 4. Moslems of the same sect as the sovereign, who openly oppose him in force and arms on whatever account. These two last classes are properly called rebels, and the same laws apply to each of them: it is, however, to be observed, that to constitute rebellion, it is indispensable that the sovereign authority should be exercised by a lawful prince.

Whenever the sovereign is informed that preparations are making for insurrection by the purchase of arms and the means of war, he ought immediately to imprison all persons accused of being concerned in such preparations, and to detain them in confinement until they repent of their evil intentions; but should these measures be ineffectual, and the rebels be drawing together, the prince ought still to be slow in commencing hostilities, and previously endeavour to recall the rebels to their allegiance by pointing out the impropriety of their conduct; and, if the case require it, by correcting or removing the cause of their defection. The prince must not, however, neglect adopting the necessary means for quelling the insurrection; and as soon as he finds pacific measures to be of no avail, it is incumbent on him to proceed immediately to the reduction of the rebels by force of arms.

All the subjects of the prince are bound to assist him in suppressing rebellion; and if in the progress of the war a faithful subject kill a rebel or destroy his property, he is exempt from all responsibility, and no ways liable to compensation, fine, or retaliation. Nor, according to the general opinion, is a rebel who kills a faithful subject, or destroys his property, liable to any responsibility, though he is held to be culpable in the sight of God, on account of these acts having been committed in an unlawful cause. The prince also is not to make slaves of the rebels, or of their families, nor to divide their property amongst his troops; but he must sequester such property, and not restore it to them until they repent and return to their allegiance.

It is not lawful to sell arms or warlike stores in the camp of rebels; but there is nothing to prevent the sale of them in a town to any person, whether he be known to be a loyal subject or not. It is not, however, unlawful to sell to rebels the materials of arms, such as wood and iron. This rule is contrary to the law regarding enemies who are unbelievers; for to them the sale of arms, warlike stores, horses, and iron, is strictly prohibited; but in either case the sale of provisions and articles of clothing is permitted.

If rebels collect the revenue of any district or territory, which afterwards submits to the prince, or from which they are afterwards expelled, the prince must not exact the revenue a second time for the period for which it has been already paid.

APOSTASY.

If a true believer apostatize, he is to be imprisoned for three days, during which period endeavours to reclaim him must be made; but should he persist in his apostasy, he is to be put to death: for there are only two modes of repelling apostasy, the turning again to the faith of Islam, or death. The first, however, is preferable; and it is therefore advisable that the apostate should be indulged with a short delay, in order that he may reflect on his sin; and that should he be actuated by any religious doubts or scruples, these may be removed by persuasion and instruction. But if a Moslem kill an apostate, without these conciliatory measures being adopted, though such an act ought to be avoided, yet the Moslem incurs no responsibility; for the infidelity of the apostate, as of an alien not under legal protection, renders the killing of him lawful. In the case of a woman becoming an apostate, she is not to be put to death, but to be imprisoned until she returns to the true faith. But a difference of opinion exists respecting the manner in which a child under age, but of sufficient sense and understanding, who becomes an apostate, ought to be treated; some jurists holding, that his want of age exempts him, as in other cases, from responsibility, as he has no legal power over his own acts; and others, that he ought to be imprisoned until he returns to Muhammedanism.

It is difficult to ascertain exactly, on account of the diversity of opinions held on the subject by Muhammedan jurists, the legal disabilities to which an apostate becomes liable; for if he escape death, by concealing himself in his own country, or by absconding into another, Abú Hanífah is of opinion that his right in his property is *ipso facto* suspended from the moment that he becomes an apostate, but that it reverts to him on his returning to the true faith. Abú Yúsuf and Muhammed, on the contrary, hold that the apostate retains his right in his property, and that consequently all his acts with respect to it are legal; but it is agreed, that if he be either killed in his apostasy, or he abscond, and the *Kází* issue a decree of outlawry, his right in his property then ceases, and that such property[1] devolves immediately

[1] Abú Hanífah holds, that if any part of this property has been acquired during his apostasy, such part is to be confiscated to the public treasury; but this opinion is controverted by Abú Yúsuf and Muhammed.

on his heirs, after the discharge of all debts which may be due by him. It is also held, that, with the exception of acts relating to his own property, the apostate becomes dead in law. His marriages, guardianships, executorships, and the like, are therefore *ipso facto* dissolved, and he is rendered incompetent, until he returns to the true faith, to perform any civil functions whatever.

The preceding are all the public wrongs which are specifically provided for by the Muhammedan law; but with regard to crimes, it has been justly observed by BLACKSTONE, that to constitute a crime against human laws there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will. He enumerates six cases where the will does not join with the act; 1. Infancy; 2. Idiotcy or lunacy; 3. Drunkenness; 4. Misfortune or chance; 5. Ignorance or mistake; and 6. Compulsion. From the preceding remarks it will have appeared that the Muhammedan law exempts minors and lunatics from responsibility in all criminal cases, though it holds them answerable for damages on property. Drunkenness is itself an offence, and is therefore an aggravation of another offence, and not an excuse for it. Between chance and mistake the law makes a slight distinction; but though it ascribes no criminality to an act under such circumstances, yet it subjects the agent and his relations to a penalty for not being as cautious as they ought to have been. But the sixth case—*compulsion*—forms a distinct title of Muhammedan law; and though it applies equally to civil and criminal cases, I have thought it best to defer its consideration until now, in order that it might be explained in a single place.

COMPULSION.

To constitute compulsion, it is indispensable that the compeller has the power and means of carrying his threats into effect, and that the person compelled was under the fear and apprehension of immediately suffering the evil threatened, unless he complied with what was required of him. If, therefore, a person exercise compulsion on another by beating, wounding, or imprisoning him, in order to force and constrain him to buy or sell certain property, or to acknowledge a debt not due, or to enter into or to dissolve a contract, or to make a confession, any act thus performed under such compulsion is invalid, and the person compelled is not bound to adhere to it. Should he, however, after the compulsion has ceased, confirm the act, it becomes lawful.

If a person, by the threat of death or bodily harm, compel another to destroy property, the compeller, and not he who acts under com-

pulsion, is answerable for it; and from the former the compensation must be demanded.

If a person compel another to divorce his wife or manumit his slave, such divorce and manumission is valid, and shall take effect; but the compeller is bound to pay the dower of the wife and the value of the slave.

If a person commit fornication or adultery on compulsion, ABÚ HANÍFAH is of opinion that he is liable to punishment; but ABÚ YÚSUF and MUHAMMED hold that he is not.

Though the blood of a Muhammedan is so sacred that it would be a laudable act to sacrifice one's own life rather than shed it, yet, in compassion to the weakness of man, should a person, by the fear of bodily harm or death, be compelled to commit a wilful murder, he incurs no punishment, but the compeller is subject to retaliation. This is the opinion of ABÚ HANÍFAH and MUHAMMED, who argue that the person compelled is in this instance constrained to commit the murder, by the natural instinct which leads a man to prefer his own life to that of another, and that he is therefore to be considered as merely the instrument of the compeller; but ABÚ YÚSUF holds that neither of them is subject to retaliation, because it is doubtful on which of them it ought properly to be inflicted; and SHÁFI'Í maintains that they both incur retaliation, as they were equally the cause of the death of the person murdered. This applies to wilful murder only; and the case of a person who is compelled to commit an act, from which either unintentional homicide or mayhem insues, is not noticed in the *Hidáyah*.

If one attempt to compel another to forsake the true faith, merely by blows or imprisonment, such compulsion is not a sufficient constraint on his will; but if the person compelled be under the fear and apprehension of suffering death or bodily harm, he is held excusable if he embrace infidelity, provided that he only does so outwardly, and that inwardly he continues firm in the true faith; yet if he persist in refusing to abjure his religion unto death, his merit is greater, and he will receive an ample reward in heaven.

I have delayed, until this place, adverting to the important distinction made by the English law between principal and accessory; for it will now be apparent that such a distinction is contrary to the very first principles of Muhammedan law, which require, that to convict a man of an offence, positive proof shall be given that he was the actual perpetrator of the offence charged. It hence necessarily follows, that the procuring, counselling, or commanding the commission of a crime, and the receiving, relieving, or assisting the criminal after it has been

committed, come not within this rule of evidence; and the law has not specifically declared that such acts shall constitute offences, and shall subject the doer of them to punishment. Of the moral culpability of accessories before the fact, Muhammedan jurists could have no doubt; and it seems therefore singular that the case should be entirely omitted in their law: but it is not improbable that this has originated from their peculiar notions respecting the nature of evidence, which have been adopted in the general spirit of humanity that pervades the whole of their law; for the preceding remarks will evince that the principal object of every rule is to contribute to the acquittal, and not to the conviction of an offender. Guilt, therefore, is made to consist solely in the perpetration of an offence, and until it is actually committed the intention of the offender is not fully demonstrated; and there is consequently room to suppose, until the very last moment, that he may have repented of and desisted from his original intention. But it is evident that this favourable presumption cannot have place if the accessory before the fact be made responsible for the act of an absent agent, whom he may have, under erroneous impressions arising from misrepresentation, resentment, or any other cause, advised or commissioned to perpetrate a crime. In this case, however repentant the accessory may become, it may be perfectly out of his power to prevent the commission of the fatal act: since also they hold that example is the only lawful end of punishment, it may have been thought that this object was completely attained by the punishment of the principal, and that it was therefore improper to extend, in the person of the accessory, the example further than was absolutely requisite; but that, if the parent assist his child or the child his parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who have any of them committed a felony, the receivers become accessories *ex post facto*, and consequently subject to punishment, is a doctrine so totally repugnant to every notion and every feeling comprehensible to a Muhammedan, that it could never have entered for a moment into the contemplation of a Muhammedan jurist.[1]

[1] Except in the case of receiving stolen goods, knowing them to be stolen, it is impossible to understand on what principle of justice, as far as regards the individual, an accessory after the fact is subject to punishment; and it may be reasonably doubted, whether the good of the state renders such punishment expedient or necessary. The Muhammedans may, therefore, be excused in not having discovered either its expediency or necessity.

JUDGMENT AND EXECUTION.

In the course of the preceding remarks, I have mentioned the testimony by which each offence is to be proved, and the punishment to be awarded for each, and the manner in which it is to be carried into execution. It only remains to observe, that judgment does not subject the family of the criminal to any legal infamy or legal disability. It is even laid down in the *Hidáyah*, that the usual funeral ceremonies are to be performed for the person who is slain for wilful murder or adultery, and prayers said over his grave, because he has, by giving up his life, fully satisfied the obligation which he had incurred; but for robbers and rebels funeral ceremonies alone are to be performed, and prayers are not to be said over their graves; nor does conviction, judgment, or execution, in any manner affect the criminal's right in, and control over, his property, personal or real; which, on his death, descends, according to the usual rules, to his heirs and legatees.

GENERAL REMARKS.

I have thus attempted to give a faithful abstract of Muhammedan law; and it will perhaps appear, that it exhibits a solitary instance in the annals of nations of a code of laws being rendered inefficient by its extreme humanity.[1] It expressly declares that it is meritorious to conceal offences, and to prove them it requires evidence which it must, in many cases, be impossible to adduce. It is much to be regretted that there are not, as far as I am aware, any sufficient data from which a judgment on the moral effects produced by so singular a code could be formed. But there does not appear in history, or in travels, any details which would warrant a conclusion that the Muhammedans have ever been remarkable for either vices or crimes: the reverse, on the contrary, might be justly inferred; and the state of Muhammedan society, even under the defects of its government, might evince that morality and virtue do not depend on the severity of penal laws. It must, at the same time, be admitted, that even in the degree of civilization in which the Muhammedans have long remained, cases must have occurred that were not provided for by their laws, and yet deserved punishment. Such cases, however, were not likely to occur frequently, because commerce and laws arising from inequality

[1] Barbarous as the *lex talionis* must be admitted to be, yet the criminal has by it a much better chance of preserving his life than if he were dependent solely on the mercy of the prince.

of ranks being unknown, theft, robbery, homicide, and insurrection, seem to be the only offences of importance which would commonly take place in such a state of society. But still cases might occur; and it therefore becomes a question what were the means by which any inefficiency in the Muhammedan laws was rectified.

On this point it is with the greatest diffidence that I venture to express a doubt with respect to the correctness of the following opinions contained in the analysis of the Bengal regulations; but they seem to me to be inconsistent with every principle of Muhammedan law. "There are three degrees of imperfect evidence. The first produces *shuk*, or uncertainty whether the charge be true or false; the second establishes *zun*, or presumption that the charge is true; the third excites *wuhm*, or doubt against the truth and probability of the fact alleged: the degree of *zun* is admitted to be a ground of legal conviction and sentence, provided the mind receives a strong impression and assurance from it, in which case it is denominated *akbur-i-race* and *zun-i-ghalib*. This degree of presumption amounts nearly to certainty, and is fully described as such in the *Ashbaho Nuzayer*. The sum of what has been mentioned upon imperfect evidence is, that a penal sentence may be founded upon it when, in the judgment of the magistrate, it affords strong ground of presumption that the crime charged has been committed by the party accused." "In the *Moheet*, it is declared that shedding blood upon violent presumption is authorised."[1] "Discretionary punishment may in all cases be inflicted by the Imam upon strong presumption, whether arising from the credible testimony of men or women of whatever religion, or from circumstances which warrant a violent presumption of guilt."[2] "Discretionary punishment upon strong presumption of guilt is, indeed, left to the judgment of the *Kází* in all the instances specified; but excepting those mentioned in the final class of each division wherein exemplary punishment extending to death is sanctioned, it is not meant that the *Kází* should, at his discretion, adjudge *Tazeer*, equal to the penalties of *Hudd*." "From the definition given of *Seeasut*, or exemplary punishment for the protection of the community, it is manifestly intended to be occasionally inflicted by the Imam, when it may appear expedient and not constantly adjudged."[3] "With respect to crimes which, on proof, are subject to the specific penalties of *Hudd* and *Kisas*, a difference of opinion has obtained among the learned, whether they are liable to *Tazeer* or not. Those

[1] Analysis of Bengal Regulations, Part ii. pp. 334, 335.
[2] Ibid. p. 332.
[3] Ibid. pp. 331, 332.

who include such offences in the provisions for discretionary correction and punishment, consider these to extend to every unlawful act which is injurious to the community or to individuals; whereas those who maintain the opposite doctrine restrict *Tazeer* to acts for which no specific penalty is fixed by the law: the former construction, however, is preferred, and generally admitted."[1]

If these opinions be correct, it will be evident that law has long ceased to exist among the Muhammedans of India; for, if the *Kází* be authorised to dispense with the rules of evidence, and to inflict discretionary punishment extending to death even in cases for which specific penalties are prescribed, all reference to first principles, to the Koran, the traditions, or the authority of the earlier jurists, becomes perfectly superfluous. But if this had been the case in India, it might be expected that some regulations would exist similar to those which have long prevailed in Persia, and which are thus described by CHARDIN:—"Le droit civil des Persans se distingue aujourd'hui en *cheray* et *ourf*;[2] et c'est une chose fort remarquable que cette distinction de justice. *Cheray* est, comme je viens de le dire, le droit civil fondé sur l'Alcoran et sur les commentaires qui ont été faits dessus par les douze premiers successeurs de Mahomet; *ourf* signifie proprement violence et force, et il se prend ici pour la force opposée au droit, c'est-à-dire, pour la raison du plus fort, comme nous disons: ce nom vient de ce que cette justice *ourf* est fondé sur la seule autorité royale. Les devots Persans, et surtout les ecclésiastiques, regardent ce droit *ourf* comme une espèce de tyrannie, et ils s'écrient sur la plupart des actes de justice qui procedent des tribunaux du gouvernement politique, *ourf est, cheray n'est*; c'est-à-dire, *que c'est une sentence de violence, et non pas juridique*: cependant ce droit *ourf* n'est que le droit naturel bien entendu."[3] But that such a distinction never

[1] Analysis of Bengal Regulations, Part ii. p. 328.

[2] "The *urf*, or customary law, which is administered by the king, his lieutenants, the rulers of provinces, governors of cities, lay magistrates of towns, managers, and collectors of districts, and heads of villages, aided by all the different subordinate officers who act under their authority, bears some resemblance, in its cognizance of petty offences, to that kind of authority which, in better-ordered communities, is vested in magistrates of police; but the magistrates in Persia always exercise the chief local authority, and consequently are above the law instead of being checked by it. The decrees are instantly enforced by the strong hand of power. They are prompt and arbitrary in their decisions; and as they seldom bestow much time in the consideration of evidence, they are continually liable to commit injustice, even if their intentions are pure."—Sir JOHN MALCOLM'S *History of Persia*, vol. ii. pp. 447, 448.

[3] Voyages du CHARDIN, vol. vi. p. 70, M. Langlès observes in a note on this passage—"Il est assez étrange que l'on ne trouve nuls renseignements sur le *ourf*

existed in India might be inferred from the following passages of the Analysis of the Bengal Regulations:—"It has been remarked by Sir W. Jones, in his preface to the *Sirajeeyah*, that although Abú Hanífah be the acknowledged head of the prevailing sect, and has given his name to it, yet so great veneration is shewn to Abú Yúsuf and the lawyer Muhammed, that when they both dissent from their master, the Musulman judge is at liberty to adopt either of the two decisions which may seem to him more consonant to reason and founded on the better authority. This remark corresponds with the received opinion of present lawyers."[1] "If, however, no authorities be forthcoming, and the *Kází* be a qualified jurist, he may consider in his own mind what is consonant to the principles of right and justice, and applying the result, with a pure intention, to the facts and circumstances of the case, let him pass judgment accordingly: but if he be not a qualified person, let him take a legal opinion from others who are versed in the law, and decide in conformity thereto. He should in no case give judgment without knowledge of the law, and should never be ashamed to ask questions for information and advice."[2]

These passages are irreconcilable with the opinions contained in the former quotation. The misapprehension has, I conceive, originated from not drawing a distinction between the law exercised regularly and judicially, and the power of investigating and deciding on all cases, civil or criminal, which is the prerogative of Muhammedan princes, and which was generally exercised by the emperors of Delhi personally, or by their ministers, or by the governors of provinces. It does not, however, appear, that the causes brought before them ever interfered so materially with the usual administration of justice as to occasion such a marked distinction between the decisions of the emperor and the *Kází*, as to render it requisite that they should be discriminated by a particular name as in Persia. In the first case, it may easily be supposed that little attention was paid to rules of evidence or legal authorities, and that the decision was oftener founded on influence, favour, or caprice, than on the real merits of the case; but an appeal to the prince would sometimes obtain redress, and, in many cases, his authority alone could effect the punishment of a pow-

dans le volumineux traité de jurisprudence Musulmane, intitulé *The Hidáyah or Guide*, ni dans *Tableau Général de l'Empire Othoman*." It would have been much stranger if any notice had been taken of this "raison du plus fort," in works which rest professedly on the writings of Abú Hanífah and his disciples, when these are founded solely on the Koran, the traditions, and established decisions.

[1] Analysis of Bengal Regulations, pp. 223, 224.

[2] Ibid. p. 228.

erful delinquent.[1] There seems, however, to be no grounds whatever for supposing that this discretionary power was ever exercised by the *Kází*, or other officer of justice; it was reserved entirely to the prince, the ministers, and the governors of provinces.

These remarks have appeared to me requisite in order to remove any doubt that might occur respecting the correctness of the preceding abstract. They will, perhaps, shew, that in every Muhammedan country there exists, in fact, two modes of administering justice; the one by the prince personally, or by persons to whom that power may be delegated in virtue of the offices which they hold; and the other by judges skilled in jurisprudence and theology. In the first case, it will be evident that the personal administration of justice by the prince, or his ministers, can be subject to no rules or restrictions, and that the extent to which it may be carried must depend principally on the prejudices of the people. In Persia, it seems, the authority of the prince prevails; in Turkey, on the contrary, the influence of the jurists is firmly established; and in India, the concurrence of both appears to have been maintained without any material encroachment on the jurisdiction of each other.

But whenever justice was duly and regularly administered by men of the law, they were bound to adhere scrupulously to the rules and provisions of the law. In such a case it seems incontrovertible that a *Kází* could not legally found a decision on what is termed imperfect evidence in a preceding quotation; for the number of witnesses required in civil cases rests on this text of the Koran—*Call to witness*

[1] Many instances are mentioned in history of the patience and affability with which Muhammedan princes and their ministers received complaints, and of the striking justice of their decisions. With regard to the emperors of Delhi, the author of the *Seir Mutakherin* remarks—"The prince and his ministers bestowed more attention upon the administration of justice than on any other part of the government; nor did they suffer that injustice should become justice by prescription, or that any one should oppress another at his will; they took care to appoint proper persons in every branch of such an office, and had rendered extortion and bribery so odious, that to call one a bribe-taker was resented much more than if it had been the most opprobrious imputation. It was, in consequence of such regulations and attentions, that such men of virtuous principles were found out as reckoned bribery amongst the highest reproaches, and thought it little short of infidelity and apostasy." "It was so very easy for poor men to arrive at the very feet of the emperor, and to obtain redress, that when, notwithstanding all these precautions and these attentions, some oppression chanced to take place, we have instances of oppressed ones, who would sometimes come from two or three months' journey and obtain audience, and expose their complaint, and were they the poorest of men they were sure of being righted against the most powerful adversary." Not having the original, I quote the translation, *notâ manûs*, vol. ii. p. 563.

two witnesses of your neighbouring men; but if there be not two men, let there be a man and two women of those whom ye shall choose for witnesses; if one of those women should mistake, the other of them will cause her to recollect; and it is argued that it follows, *à fortiori*, that the same number must be required in criminal cases. The exclusion of women as witnesses in cases of *Kisas* and *Hudúd*, is founded on this undisputed tradition, that in the time of the prophet and his two immediate successors, it was an invariable rule not to admit the evidence of women in cases of *Kisas* and *Hudúd*. The jurists, however, seem to have thought that the rejection of an unbeliever's testimony against a Moslem, was a point so well established that it required no authority to be cited in its support.[1] It is hence apparent, that in civil cases the very facts in issue must be proved by two Moslem men, or one Moslem man and two Moslem women; that the same rule applies to what I have termed misdemeanours; but that in other offences the evidence of women is not admitted, and the facts must consequently be proved by two men.[2] Imperfect evidence, therefore, that is, presumptive, or given by incompetent witnesses, or by fewer than the legal number, cannot be admitted in Muhammedan law; and this seems even admitted in the Analysis of the Bengal Regulations; for the admissibility of imperfect evidence would appear to be restricted to those cases only in which a *Kází* is at liberty to award a discretionary punishment. But as it is, at the same time, laid down that discretionary punishment is awardable even for offences for which the law has prescribed specific penalties, the restriction avails not, and thus the admission of imperfect evidence is extended to all cases. That this is not the Muhammedan law, I think the preceding remarks will fully establish.

I admit, at the same time, that it may be inferred from more than one place in the *Hidáyah* (and I suppose from other law-books), that Abú Hanífah, and his two disciples, Abú Yúsuf and Muhammed, were of opinion that in cases where an offender, of whose guilt there was no doubt, was likely to escape punishment from defective evidence, or from legal objections, a *Kází* might use his discretion in supplying the defect of the law; but, as it does not appear in what particular instances or to what extent it might be so used, this opinion will not warrant the conclusion that a discretionary sentence extending to death may be awarded on imperfect evidence. The rules respecting

[1] It is merely mentioned incidentally in the *Hidáyah*.

[2] It will be recollected that fornication and adultery must be proved by four male witnesses.

evidence are very copious in the *Hidáyah*, and they are derived principally from ABÚ HANÍFAH and his two disciples; and there is not a single sentence in the whole book which authorises, or in any manner permits, a *Kází* to dispense with these rules. The same authority, also, expressly restricts discretionary punishment to petty offences, though in heinous crimes, not provided for by the law, it seems to admit that the prince is at liberty to punish the criminal. It must be evident that if the last be the received opinion, as I conceive it is, the Muhammedan law is perfect, and comprises plain and simple rules of evidence, and a regular gradation of offences and punishments: it may be defective in not providing for every possible case and in requiring a greater degree of proof than is requisite;[1] but, as far as it extends, it is clear and intelligible, and leaves scarcely any thing to the discretion or judgment of the *Kází*. But the doctrine which I controvert leaves every thing to his discretion, and destroys the very foundation of all law; for its inevitable consequences would vest every petty *Kází* with the power not only of making *ex post facto* laws, and declaring culpable whatever acts he thought proper, but of deciding on the kind of evidence requisite for their substantiation, and of inflicting whatever punishment he pleased on the agent who might be so convicted.

I have thus imperfectly, but I trust correctly, explained the most important principles of Muhammedan law. The perusal of this abstract will perhaps excite surprise that the government of British India, and the legislature of Great Britain, should have been so anxious to preserve and enforce a code of laws the fundamental principles of which are, that the British cannot exercise a lawful sovereignty over Muhammedans; that every Muhammedan is at liberty to kill them individually with impunity; that it is a solemn obligation imposed by God on every true believer to make war against them collectively; that no person can legally exercise the office of a judge unless he be a Muhammedan, and that, should any such person have intruded himself into that office, his acts are null and void *ab initio*; and that no person, unless he is a true believer, can fill any situation which gives him the slightest degree of power or authority over a Muhammedan. These are not speculative opinions confined to the schools, but so interwoven with their religion that every Muhammedan of the slightest education must be in some degree acquainted with them; but they are more particularly inculcated in their law-

[1] The deciding on presumptive evidence may in most cases be trusted with safety to a jury; but the not intrusting it to a single individual, who must frequently be undistinguished by either ability, learning, or capacity, must certainly be considered as a very humane provision in the Muhammedan law.

books, as there is scarcely a page in any one of them in which these opinions do not occur, either as the subject discussed, or by the way of argument and illustration; yet the British government have diligently extended the circulation of these books by printing them, and facilitated their comprehension by causing them to be translated from Arabic into Persian.

But the government, at the same time, have found the Muhammedan law so defective that they have been induced to alter it entirely in the case of perjury, subornation of perjury, forgery, theft, robbery, mayhem, homicide, and crimes against the state; and also to alter materially the rules of evidence: new courts of justice, and new forms of process and trial, which were before perfectly unknown to the Muhammedans, have been also introduced. I may, therefore, be permitted to observe, with all due deference and respect, that the Muhammedan law, however nominally preserved, no longer exists in India; and that a most singularly inconsistent and contradictory duty is at present imposed on the Muhammedan law-officers of the different courts of justice, as they are required, in many cases, not to give their opinion simply according to their own law, but according to that law as it is modified by certain regulations of government. It would not become me to venture any opinion on these regulations; but I may perhaps be excused for expressing a doubt whether it be possible to reconcile such modifications to the first principles of Muhammedan law. These appear to me to differ so essentially from the principles of English law, most particularly in the rules of evidence, that the attempt to reconcile the decisions and dicta of Abú Hanífah, Abú Yúsuf, and Muhammed, with the opinions and decisions of English lawyers, must be perfectly impracticable. It may also be doubted whether, were it practicable, the learning and abilities of the present Muhammedans of India are capable of effecting such a reconciliation.

VANS KENNEDY.

Bombay, 1st March, 1829.

APPENDIX.

In order to render this Abstract complete, I subjoin the contents of the *Hidáyah;* because the same arrangement is observed in all digests of Muhammedan law. It is to be remarked, that the title of inheritance is entirely omitted in this work; and that I have noticed, in the Abstract, such parts only as relate to the municipal law.

Book		
I....	الطهارة	*At-Taháral*—Purification.
II....	الصلوة	*As-Salát*—Prayer.
III....	الزكوة	*Az-Zakát*—Alms.
IV....	الصوم	*As-Saum*—Fasting.
V....	الحج	*Al-Hajj*—Pilgrimage.
VI....	النكاح	*An-Nikáh*—Marriage.
VII....	الرضاعة	*Ar-Razáat*—Fosterage.
VIII....	الطلاق	*At-Talák*—Divorce: including several chapters on the furnishing of necessaries, نفقة *nafakah*, to wives, children, and slaves.
IX....	العتاق	*Al-Atáh*—Manumission.
X....	الايمان	*Al-Aimán*—Vows.
XI....	الحدود	*Al-Hudúd*—Prescribed punishments in the case of adultery, fornication, drinking intoxicating liquors, and falsely accusing a married woman of adultery. It also includes a chapter on تعزير *Tazír*, or discretionary punishments for small offences.
XII....	السرقة	*As-Sarikat*—Theft: including Highway Robbery.

Book		
XIII....	السير	*As-Sair*—War: comprising every thing relating to war, peace, conquered countries, captured property, tributaries, aliens, revenue, and the duties and prerogatives of a king.
XIV....	اللقيطة	*Al-Lakítat*—Foundlings.
XV....	اللقطة	*Al-Luktat*—Trove.
XVI....	الاباق	*Al-Ubbák*—Fugitive slaves.
XVII....	المفقود	*Al-Mafkúd*—Non inventi. Persons who have disappeared, and it is not known whether they be living or dead.
XVIII....	الشركة	*As-Shurkat*—Partnership: including joint-tenancy.
XIX....	الوقف	*Al-Wakf*—Alienation to charitable uses.
XX....	البيع	*Al-Baya*—Sale.
XXI....	الكفالت	*Al-Kafálat*—Caution.
XXII....	الحوالت	*Al-Hawálat*—Transfer of debts.
XXIII....	ادب القاضي	*Adab-ul-Kází*—Duties and qualifications of a *Kází*: including arbitration.
XXIV....	الشهادت	*Ash-Shahádat*—Evidence.
XXV....	الرجوع من الشهادت	—Retraction of evidence.
XXVI....	الوكالت	*Al-Wakálat*—Commission and procuratorship.
XXVII....	الدعوي	*Ad-Dawá*—Plaint and process.
XXVIII....	الاقرار	*Al-Ikrár*—Confession and acknowledgment.
XXIX....	الصلح	*As-Sulh*—Accord.
XXX....	المضاربة	*Al-Muzárabat*—Commission with a valuable consideration.
XXXI....	الوديعة	*Al-Wadíat*—Deposit.
XXXII....	العارية	*Al-Áriat*—Loan.
XXXIII....	الهبة	*Al-Hibat*—Gift.
XXXIV....	الاجارات	*Al-Ijárát*—Hiring.
XXXV....	المكاتب	*Al-Mukátib*—Freedmen.

Book		
XXXVI.	الولاء	*Al-Walá* — Patronage.
XXXVII.	الاكراه	*Al-Ikráh* — Compulsion.
XXXVIII.	الحجر	*Al-Hijr* — Inhibition.
XXXIX.	الماذون	*Al-Mazún* — Licensed slaves.
XL.	الغصب	*Al-Ghazb* — Dispossession.
XLI.	الشفعة	*Ash-Shufat* — Right of pre-emption.
XLII.	القسمة	*Al-Kismat* — Partition of joint-property.
XLIII.	المزارعة	*Al-Muzáraat* — Hiring of land for cultivation.
XLIV.	المساقاة	*Al-Musákát* — Hiring of gardens, orchards, &c. for cultivation.
XLV.	الذبايح	*Az-Zabáiah* — Rules relating to the killing of animals for food.
XLVI.	الاضحية	*Al-Uzhiat* — Sacrifice.
XLVII.	الكراهيه	*Al-Karáhiat* — Unlawful acts; infractions of the religious but not the municipal law.
XLVIII.	احياءالموات	*Ihyá-ul-Mawát* — Cultivation of waste lands.
XLIX.	الاشربة	*Al-Ashribat* — Prohibited liquors.
L.	الصيد	*As-Said* — Hunting.
LI.	الرهن	*Ar-Rahn* — Pawning.
LII.	الجنايات	*Al-Jináyát* — Homicide and mayhem.
LIII.	الديت	*Al-Diyat* — Fines for unintentional homicide and mayhem.
LIV.	المعاقل	*Al-Maákil* — Persons responsible for these fines.
LV.	الوصايا	*Al-Wasáyá* — Last will and testament, and executorship.
LVI.	الخنثي	*Al-Khunsá* — Hermaphrodites.